CASE AND COMMENT

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# The Genesis of the Supreme Court

BY HANNIS TAYLOR, LL. D.

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[Honorable Hannis Taylor has devoted thirty-six years to a study of the Constitutions of England and the United States, and out of these labors grew his treatise on "The Origin and Growth of the English Constitution," and his work on "The Origin and Growth of the American Constitution," which is just coming from the press. The former work received great honor in the British Isles and has been formally adopted as a text-book by the University of Dublin. Mr. Taylor's works on "The Origin and Growth of International Law" and on "The Jurisdiction and Procedure of the United States Supreme Court" are also well known to the profession. He is now a resident of Washington, District of Columbia, where he makes a special business of practice before the United States Supreme Court.

The underlying thought of this article, which was written expressly for CASE and COMMENT, is fully elaborated in his book just issued.—Ed.]

THE Federal Convention of 1787, which worked only eighty-six days, shrouded its proceedings in a secrecy as profound as that surrounding a masonic lodge, sealed its records at the close, and committed them to Washington with the injunction "that he retain the journal and other papers subject to the order of Congress, if ever formed under the Constitution." Not until 1818 did Congress partially break the seal by directing the publication of the journal, which Adams tells us was "no better than the daily minutes from which the regular journal ought to have been, but never was, made out." The real records of the proceedings of the Convention, prepared by the semi-official reporter, James Madison, and now embodied in the three volumes of his priceless "Papers," was not published by Gilpin until 1841. In that way fifty-four years passed by, after the adjournment of the Convention, before the full report of its secret proceedings was given to the world. During that half century of mystery and suppression, it was that the mythical history of what actually took place in the secret conclave crystallized into a series of misty and misleading impressions so fixed in the minds of many that it is now difficult to dislodge them even with the aid of clear and explicit documentary evidence.

### The Confederation a Servile Copy.

As all the world knows, our first Federal Constitution, embodied in the Articles of Confederation, was simply a servile copy of that ancient type of a Federal league, whose monotonous history extends without a material variation from the Greek Confederations down to the rise of the Seven United Provinces of the Netherlands, whose articles of association were taken as the standard for imitation. Franklin, who made the first draft of the Articles in 1775, and Dickinson the second, in 1776, showed no fertility of resource whatever. They simply reproduced the antiquated form of a Federal league, with no Federal executive, no Federal judiciary, with all the Federal powers vested and confused in a one-chamber assembly, devoid of the power to tax and devoid of jurisdiction over individuals,—an assembly in which every state, great and small, had one vote. Such was the nature of the league adopted by Congress in November, 1777, and recommended to the states.

### The New Federal Fabric.

Just ten years later emerged from the Federal Convention, at Philadelphia, the entirely unique system, different in every vital particular from the first, and described by Tocqueville as "a great discovery in modern political science," based "upon a wholly novel theory," which has "produced the most momentous consequences." Tocqueville was the first foreign critic to recognize the fact that out of the work of the Federal Convention of 1787 emerged a new Federal fabric without a prototype in history,—a Federal fabric armed for the first time with the independent power of taxation; a Federal fabric divided for the first time into three departments,—executive, legislative, and judicial; a Federal fabric endowed for the first time with a two-chamber legislature; a Federal fabric endowed for the first time with a judiciary capable of putting the stamp of nullity on national and state laws; a Federal fabric operating for the first time directly on individuals, and not on states as corporations. As attributes of a Federal government, these five were absolutely new. Certainly in regard to the origin of what is perhaps the most important political invention in the world's history, there should be at least a theory. And yet the marvel is that there has been heretofore scarcely anything that could be called a theory. When the essence of everything said by the expounders, native and foreign, on the point at issue has been extracted, the result may be formulated in this wise: At some time during the eighty-six working days of the Convention there was evolved by a process, probably supernormal, from the combined brains of eminently wise men, called by Jefferson "an assembly of demigods," the entirely new creation fully armed, just as Pallas was evolved from the brain of Jove.

### The Inspiration Theory.

Von Holst, with his critical and practical German mind, was the first to ridicule the absurdity, the childishness of what he well termed "The Inspiration Theory," by which the American people were enthralled. To use his own words: "This is not a mere idle phrase; it is one of the standing formulas in which the self-complacency and pride of a people who esteem themselves special objects of the care of the Ruler of the Universe find expression. We reproduce one illustration of this, out of a whole multitude. In the North American Review (1862, note 1, p. 160) we read: 'Such a government we regard as more than an expression of calm wisdom and lofty patriotism. It has its distinctively providential element. It was God's saving gift to a distracted and imperiled people. It was his creative fiat over a weltering chaos, 'Let a nation be born in a day.'" Von Holst then adds: "In Europe, this view of the case has been generally accepted as correct." After a twentieth-century mind trained in the historical school has been sickened by that kind of literature, whose medieval flavor suggests the "Faust-book," from which Goethe drew the supernormal parts of his immortal epic, the practical question recurs: Is there the slightest evidence that the "great discovery," the "wholly novel theory," was created or evolved after the "assembly of demigods" actually met for business? The answer is that there is quite a volume of clear, explicit, and detailed documentary evidence that the "great discovery" was not only made years before the Convention met, but that it was taken there carefully formulated in three prearranged "plans," two of which were presented during the first moments of the first day the Convention met for real business.

### The Three Plans.

There were only three plans of a new system of Federal government taken to the Convention,—the three so elaborately worked out by Madison, Pinckney, and Hamilton months before their departure for Philadelphia. If any member of the Convention was the author of the "new discovery," it was one of those three,—no kind of a claim in that regard can possibly be set up in favor of any other person. Thus, it appears from the documentary evidence that the idea that the new invention emerged from the brains of many, in some supernormal way, after the Convention met, is a pure chimera distilled during that half century of mys-

tery in which the records were under seal. *From what common source did the draftsmen of the three plans draw the path-breaking invention which was the foundation of all of them?* The writer was the first to solve that problem, simply because he was the first to undertake it. There was really no opposing theory worthy of the name, to overthrow,—it was simply a question of filling a vacuum, of removing a set of misty legends which were no credit to our historical scholarship. No great subject was ever so shamefully neglected.

### A Forgotten Political Scientist.

Early in 1783, our infant Republic was in the throes of an acute financial and commercial crisis. The first Federal Constitution, without the power to levy taxes of any kind, collapsed as a revenue-producing system. It collapsed as a directing power over interstate and foreign commerce. The storm center was in the Continental Congress then sitting at Philadelphia. In that city there lived at that time a great political economist and financier, the Adam Smith of that epoch, a genius who, foreseeing all that was to come, solved the pending financial and commercial problems by the invention of an entirely novel system of Federal government, since labeled by Tocqueville as "a great discovery in modern political science." On February 16, 1783, Pelatiah Webster, a graduate of Yale, a patriot in the Revolutionary cause, a retired merchant, and mature thinker of fifty-seven,—published at the very doors of the Continental Congress, in a pamphlet of forty-seven pages, "the wholly novel theory" of a Federal government carried to the Federal Convention of 1787 in the three plans prepared by Madison, Pinckney, and Hamilton. At that time the first named was thirty-two; the second twenty-six; the third twenty-five. Madison tells us that Pelatiah Webster was the first to propose, as early as 1781, in one of his financial essays, published at Philadelphia in May of that year, the calling of a "Continental Convention" for the making of an entirely new Constitution. Two years later he published his epoch-making paper of February 16, 1783, in which was embodied the first draft of the great invention that now gives life to the existing Constitution of the United States. From the moment the carefully prearranged "plans," restating the great invention, were presented to the Convention on May 29, 1787, to September 17, the day of adjournment, the single question before it was this: In what way and to what extent shall the great invention, as embodied in the prearranged plans, be so modified and amended as to adapt it to then existing conditions as a working system of government? After the adjournment of the Convention, Webster republished his paper with copious notes, and appealed to posterity for justice.

The problem of problems was solved when Webster conceived, for the first time in the world's history, of a Federal government armed with the independent power of taxation. That fundamental and revolutionary concept made necessary a strictly organized and self-sustaining Federal system. In working out that result he proposed, for the first time, the division of a Federal government into three departments,—legislative, executive, and judicial. The executive was to consist of a president, to be elected by Congress and surrounded by a cabinet council such as we now have. The legislative was to consist not of a single chamber, like the Continental Congress, but of two chambers, like the English Parliament. Never before in the world's history had there existed a Federal assembly of two chambers. The judicial was to consist of a supreme tribunal, with organized and appellate powers, and of such inferior courts of law and equity as the country might require.

### Inception of Federal Judiciary.

While the Articles of Confederation did not attempt to create a Federal judiciary, the Ninth Article did provide that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatsoever,"—a jurisdiction inherited from the Privy Council. "Before the Revolution," says Sir Henry Maine,

"the British Privy Council had adjudicated on certain questions arising between colony and colony." Several controversies between the states were actually brought before Congress for adjudication under that Article; and in two of them the agents of the contending states were directed to appoint by joint consent commissioners or judges to constitute a court for hearing and determining the matter in question, agreeably to the Ninth Article of the Confederation, which they succeeded in doing. An important count of Webster's indictment against the Articles of Confederation was that "they could institute no general judicial powers." That difficulty he proposed to remove by creating a supreme court, and such inferior courts of law and equity as the necessities of the country might require. He outlined the Supreme Court, with jurisdiction both original and appellate, in these terms: "That the supreme authority should be vested with powers to terminate and finally decide controversies arising between different states, I take it, will be universally admitted, but I humbly apprehend that an appeal from the first instance of trial ought to be admitted in causes of great moment, on the same reasons that such appeals are admitted in all the states of Europe. It is well known to all men versed in courts, that the first hearing of a cause rather gives an opening to that evidence and reason which ought to decide it, than such a full examination and thorough discussion, as should always precede a final judgment in causes of national consequence. A detail of reasons might be added, which I deem it unnecessary to enlarge on here." Thus emerged the splendid conception of the Supreme Court of the United States, as it now exists, armed not only with original jurisdiction "to terminate and finally decide controversies arising between different states," but also with an appellate jurisdiction "in causes of great moment, on the same reasons that such appeals are admitted in all the states of Europe." As to the inferior Federal courts, Webster contented himself with this statement: "To these I would add judges of law and chancery; but I fear they will not be very soon appointed,—the one supposes the existence of law, the other of equity,—and when we shall be altogether convinced of the absolute necessity of the real and effectual existence of both of these, we shall probably appoint proper heads to these departments."

**Extension of Federal Judicial Power.**

For twelve years after the Federal Convention of 1787 had transformed Pelatiah Webster's dream into a working system of government, the Supreme Court of the United States stood like a marble Galatea, waiting for another genius who would breathe into it the breath of life. During that time it never dared to assert its right to put the stamp of nullity upon a law, state or Federal. When the faint-hearted and narrowed-visioned Jay was reappointed as Chief Justice in 1801, he threw up his hands in despair, and insisted upon retirement upon the ground that the jurisdiction of the Supreme Court was so limited that nothing could be made of it. He wrote to President Adams, January 2, 1801, as follows: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and expediency of my returning to the bench under the present system." Jay's despairing cry was the bugle call that summoned John Marshall to his duty. The accession of Marshall is universally recognized as a turning point, not only in the history of the court, but in the history of the Constitution itself. The time was ripe for the advent of a jurist and statesman clear visioned enough to sweep the entire horizon of Federal power, and bold enough to press each element of it to its logical conclusion. Thirteen years after the organization of the court he announced for the first time, in Marbury v. Madison (1803) that it possessed the right to declare null and void an act of Congress in violation of the Constitution. The invincible logic employed in

the demonstration rested necessarily on the admission that the august right in question was a mere deduction from the general nature of a Constitution which did not undertake to grant it in express terms. No other court in history ever assumed the right to pass upon the validity of national law.

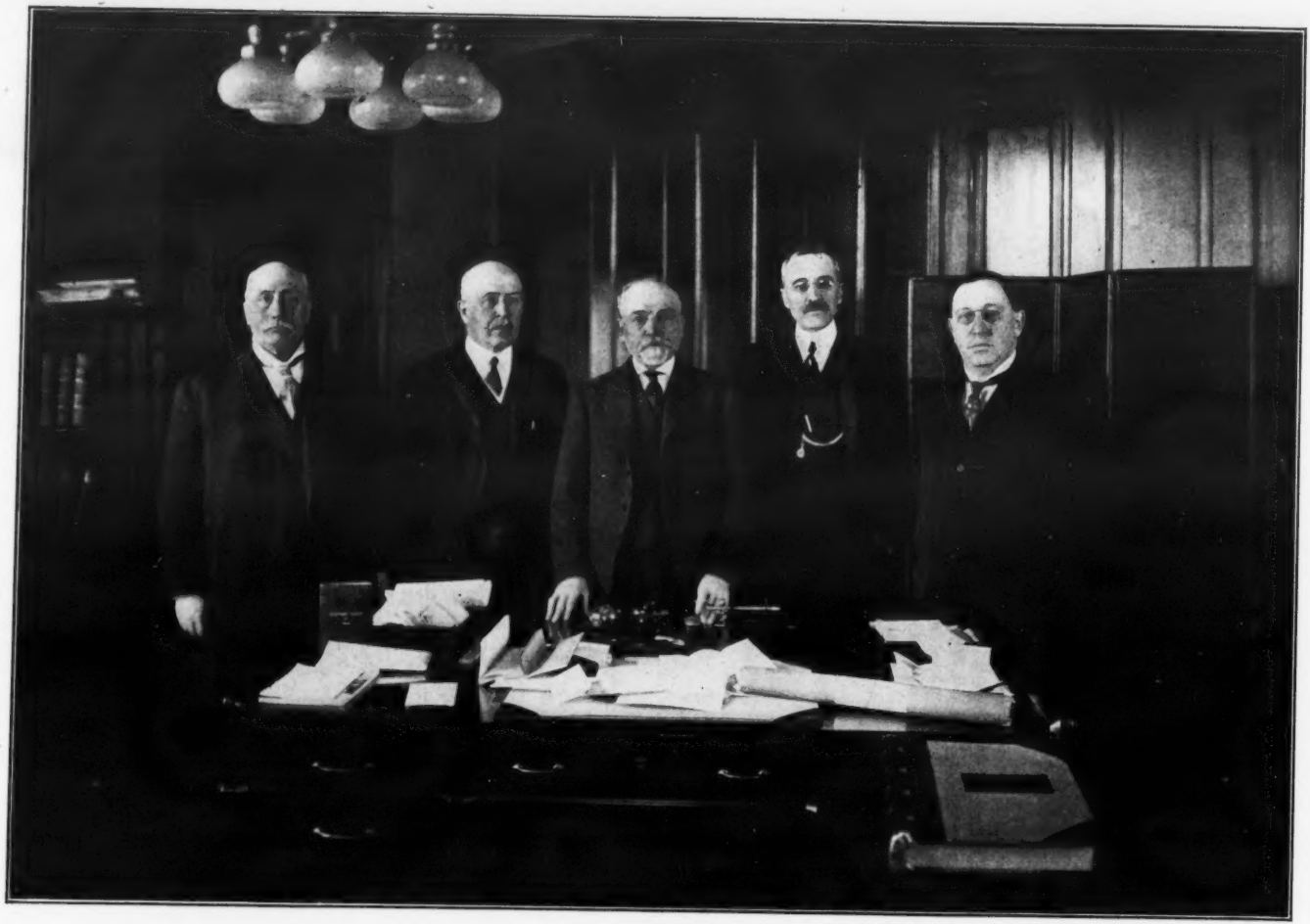
**Work of Marshall and Webster.**

The creative work of Marshall reached its climax in Cohen v. Virginia (1821) establishing the supremacy of Federal over state law. Pelatiah Webster had surveyed the entire field and blazed the path for him. In the epoch-making paper of February 16, 1783, he had said:

"1. No laws of any state whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject. This is too plain to need any proof. 2. Laws or ordinances of any kind (especially of august bodies of high dignity and consequence), which fail of execution, are much worse than none. They weaken the government, expose it to contempt, destroy the confidence of all men, native and foreigners, in it, and expose both aggregate bodies and individuals who have placed confidence in it to many ruinous disappointments which they would have escaped had no law or ordinance been made; therefore, 3. To appoint a Congress with powers to do all acts necessary for the support and uses of the Union; and at the same time to leave all the states at liberty to obey them or not with impunity, is, in every view, the grossest absurdity. . . . Further I propose *that if the execution of any act or order of the supreme authority shall be opposed by force in any of the states* (which God forbid) it shall be lawful for Congress to send into such state a sufficient force to suppress it. On the whole, I take it that the very existence and use of our Union essentially depends on the full energy and final effect of the laws made to support it, and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase, we must give it up,—the nature of the thing does not admit of any other alternative."

The unique creation, without a prototype in history, known as the Supreme Court of the United States, is the joint product of Pelatiah Webster and John Marshall *par nobile fratrum*.

> The Supreme Court of the United States is not only a most interesting, but a virtually unique creation of the founders of the Constitution. The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or modern world."—Sir Henry Sumner Maine.





COMMERCE COURT

Left to right: John E. Carland, Robert W. Archbald, Martin A. Knapp, William H. Hunt and Julian W. Mack.

# The New Courts

## The Court of Customs Appeals and the Commerce Court

BY THE EDITOR

THE court of customs appeals was created in the tariff act of August 5th, 1909, and made the court of final appeal in all controversies over the classification of imported goods. It consists of a presiding judge and four associate judges. The court is continued by the provisions of the new Judicial Code, which vary only slightly from the organic act which instituted the court. This tribunal has now been in operation about a year and its first volume of reports is in press.

### Questions Considered by the Court.

The tariff act imposes a specified duty on certain articles; but many things of which the act makes no mention are continually being imported. It is upon these things that the customs court must pass and determine in what class they shall be put and what duty they shall pay. The problems which come before this tribunal are of great interest to the commercial world, although many of the questions presented sound odd enough. "Is a hen a bird?" "Is dried duck prepared meat?" "Are hair rolls or 'rats,' made of wire framework covered with wool, dutiable as woolen goods?"—are among the infinite variety of queries which the customs court must answer. Its decision is conclusive of the question for all time, —or until a new tariff law is passed.

Questions of valuation are determined by the appraisers or are settled definitely on appeal to the general appraisers, and do not reach the court of customs appeals.

### The Judges of the Court.

The presiding judge of the court of customs appeals is Honorable Robert M. Montgomery, who, prior to his appointment, was a justice of the supreme court of Michigan. Judge Montgomery is a native of that state, having been born at Eaton Rapids on May 12th, 1849. He was admitted to the bar in 1870 and practised his profession at Pentwater, and later at Grand Rapids. He was elected prosecuting attorney in 1874, and served as assistant United States district attorney in 1887. For ten years prior to his elevation to the bench of the supreme court, he was circuit judge of Kent county.

Honorable Marion DeVries was born near Woodbridge, San Joaquin county, California, on August 15th, 1865. He is a graduate of the San Joaquin Valley College and of the Law Department of the University of Michigan. He practised law at Stockton, California, from 1889 to 1900; was assistant district attorney of San Joaquin county from 1893 to 1897, and was elected a member of the Fifty-fifth and Fifty-sixth Congresses. In 1900, he became a member of the Board of United States General Appraisers, New York, and served in that position until appointed a member of the customs court. Judge DeVries is the only one of the five judges who had enjoyed previous experience as an appraiser.

Honorable James Francis Smith was born in San Francisco, January 28th, 1859. He is a graduate of the Santa Clara College and of the Hastings Law School. He was admitted to the bar in 1881. As colonel of the First California Regiment, U. S. V., he participated in the first expedition to the Philippines, where he made a brilliant military record. He became brigadier general, U. S. V. on April 24th, 1899. In 1901, he was chosen associate justice of the supreme court of the Philippine Islands, and was subsequently a member of the Philippine Commission and secretary of public instruction. From September 20th, 1906, until November 11th, 1909, he was governor general of the Philippine Islands. He was appointed to the bench of the customs court in January, 1910.

COMMERCE COURT

Left to right: John E. Carland, Robert W. Archbald, Martin A. Knapp, William H. Hunt and Julian W. Mack.

Honorable Orion M. Barber, graduated from the Albany Law School in 1882. He practised law in his native state of Vermont. In 1886-1887 he was state's attorney of Bennington county. He subsequently served in both branches of the state legislature and as state railroad commissioner and state auditor. He was a member of the commission appointed to revise the Vermont statutes, and chairman of the special tax commission and of the special commission to prepare and publish a digest of the Vermont Reports. He was appointed to the bench of the court of customs appeals in January, 1910.

Honorable George E. Martin was born at Lancaster, Ohio, November 23d, 1857. He was educated at Wittenberg College, Springfield, Ohio, and attended lectures for two years at Heidelberg University, Germany. From 1882 to 1904, he practised law in Ohio. In the latter year he was elected to the common pleas bench. He served in that position for six years and was re-elected without opposition in November, 1910, for a second term. He was appointed by Governor Harris in 1908 as a member of the Ohio Tax Commission, for the reform of the tax laws of Ohio,

In February, 1911, he was appointed by President Taft as an associate judge of the court of customs appeals, in the place of Judge William H. Hunt, transferred to the court of commerce.

### The Commerce Court.

On June 18th, 1910, the interstate commerce act was amended by the creation of a "commerce court" with jurisdiction to enforce orders of the Interstate Commerce Commission, except those involving the payment of money; to hear cases brought to enjoin or set aside orders of the Commission; to hear cases of rebating brought under the Elkin's law and mandamus proceedings arising under § 20 or § 23 of the interstate commerce law. The powers of this court remain unaltered under the New Judicial Code.

The act establishing the tribunal provided for the appointment of five additional circuit judges by the President, who were to constitute the court, no two of whom were to be appointed from the same judicial circuit. The President was further required to designate in the first appointments the term of years during which the judges appointed should serve on the commerce court. After being relieved from that service, they are to be assigned to work on the circuits as circuit judges, and their successors are to be designated by the chief justice of the Supreme Court.

### The Commerce Court Judges.

Honorable Martin A. Knapp has been a member of the Interstate Commerce Commission since 1891, when he was appointed a member of that body by President Benjamin Harrison. He is sixty-seven years old and is a native of New York. After his graduation from Wesleyan University in Connecticut, he went to Syracuse, New York, where he entered public life as corporation counsel for the city of Syracuse. That city has been his home ever since, though since 1891 much of his time has been spent in Washington. His term on the Interstate Commerce Commission, to which he was appointed by Harrison, expired in 1897, a few days before Grover Cleveland left the White House. One of the last official acts of that Democratic President was to reappoint Mr. Knapp to the Commission. He was twice reappointed by President Roosevelt, in 1892 and 1898. He has been chairman of the Commission since 1898, and thereby became *ex officio* member of the National Board of Mediation under the Erdman act, and participated in numerous negotiations for the settlement of railway labor disputes. He was appointed by President Taft in December, 1910, an additional circuit judge of the United States and designated to serve for five years in the commerce court, and resigned from the Commission to assume the duties of presiding judge of that court December 31, 1910. Under an amendment of the Erdman law he was appointed to the Board of Mediation by President Taft for two years from March 4, 1911.

Honorable Robert W. Archbald has had a long distinguished career on the bench, arriving at his present position of district judge in the middle district of

*Photo by Harris & Ewing, Washington, D. C.*

## COURT OF CUSTOMS APPEALS

Left to right: Marion De Vries, James F. Smith, Robert M. Montgomery, Orion M. Barber, George E. Martin.

Pennsylvania after sixteen years' experience in state courts.

He was born at Carbondale, Pennsylvania, September 10, 1848, and in 1871 was graduated from Yale with the degree of A. B. He went to Scranton and studied law in the office of Hand & Post, being admitted to the bar about two years later. He practised law in Scranton until 1884, when he was elected additional law judge. He served in this capacity for three years, and in 1888 he was appointed presiding judge of the forty-fifth judicial district of Pennsylvania.

In 1901 he resigned this post to accept an appointment as district judge of the newly created middle district of Pennsylvania, where he remained despite a tender in 1909 of a place on the United States circuit bench in the third circuit.

On December 12, 1910, he was nominated by President Taft as additional circuit judge, under the act of Congress creating the commerce court, and assigned to duty in that court for the term of four years, being sworn in on February 1st, following.

Honorable William H. Hunt is a native of Louisiana, although for the last twenty-five years he has been closely identified with the public and official life of Montana. He was a member of the class of 1878 of Yale, but his graduation was prevented by ill health. However, in 1896, he was given an honorary A. M. by Yale. His first official position in Montana also included Idaho in his jurisdiction as collector of customs. That was from 1881 to 1885. Then he was elected attorney general of Montana, a position which he held three years. He was a member of the Montana constitutional convention and was an important influence in the making of that state's fundamental law. He served in the legislature of his state in 1889, and was made judge of the first judicial district of the state in the close of that year. He served in that court until 1894, when he was made associate justice of the supreme court of Montana, where he served until 1900. In April of that year he was appointed by President McKinley Secretary of the island of Porto Rico, and was first president of the Executive Council, and assisted in the establishment of civil government in that island. In August, 1901, he was appointed governor of Porto Rico.

Judge Hunt held the position of United States district judge of Montana from 1904 to 1910. He was appointed associate justice of the United States customs court in December, 1909, and assisted in the organization of that court. In December, 1910, he was appointed United States circuit judge, and designated to serve upon the United States commerce court for the period of three years.

Honorable John E. Carland was born at Oswego, New York, December 11, 1853, and graduated from the Law Department of the Ann Arbor, Michigan, University in 1875. After spending two years in a law office at Detroit, Michigan, he in 1877 moved to Bismarck, North Dakota, where he practised law and held various positions until April, 1889, when he resigned as associate justice of the supreme court of Dakota territory. He was a member of the constitutional convention that framed the Constitution of North Dakota, and after completing his work as a member of the convention he took up his residence in Sioux Falls. On August 31st, 1896, he was appointed by President Cleveland United States district judge for South Dakota, which position he held until December 12, 1910, when he was appointed United States circuit judge and designated to serve for two years on the commerce court.

Honorable Julian W. Mack, while perhaps best known for his work as head of the juvenile court in Chicago, is known throughout the United States as a man whose elevation to the bench has not put him out of touch with the important movements, civic, political, and social, of the day.

He was born in San Francisco July 19, 1866, and received his education in the public schools of Cincinnati, Harvard University, and the universities of Berlin and Leipsic. In 1890 he was admitted to the bar, and began a career that has been marked by steadily increasing importance in legal affairs.

From 1895 to 1902, he was professor of law in Northwestern University, and since 1902 he has occupied a similar position at the University of Chicago.

In 1903 he was elected to the circuit court of Cook county for a six-year term. He had served as a civil service commissioner from January to May, 1903. In 1909 he was re-elected to the circuit court, which position he held until his appointment as additional United States circuit judge. By the President's designation he is to serve on the commerce court for a term of one year.

### Value of New Courts.

The creation of these new courts was opposed by some on the ground that cases of all kinds ought to go through the same legal procedure, and that an expert court is an anomaly in American jurisprudence. But these objectors forget that this is an age of specialization; in other words, an age of mastery. The specialist is ever in demand. Why was not President Taft absolutely logical when he carried the application of this theory to the courts?

The judges whose duty it is to specialize in customs cases have acquired an intimate technical familiarity with tariff problems which will permit of more equitable decisions,—decisions which go to the root of the matter. They will safeguard both the national revenues and the exact rights of importers.

"The commerce court," said Judge Landis, "will have more to do with the peace and order of society as we know it than any other court in the United States, except the Supreme Court of the United States." The judges of this court are experts in dealing with the commercial issues growing out of our constantly multiplying commerce laws. The duty imposed upon them, of compelling just treatment of and by the great common carriers, which have been such important factors in the marvelous development of the country, is one of primary importance. The greatest justice which is humanly possible will characterize their decisions, because knowledge is power.

These two new courts will relieve the overburdened Supreme Court of no inconsiderable portion of its work. Their establishment will be pointed to by future historians as marking a decided epoch in the administration of Federal law, and as one of the crowning acts of President Taft's administration.

# The Reorganization of the Federal Judicial System

BY HONORABLE REUBEN O. MOON

Of the Philadelphia Bar and Representative in Congress from Pennsylvania

[Mr. Moon, as chairman of the house members of the Special Joint Committee on the Revision of the Laws, reported to the House of Representatives the bill to codify, revise, and amend the laws relating to the Federal judiciary, which was adopted March 3, 1911. He was a prominent advocate of the bill on the floor of the House. In this article the reasons which led him to advocate a reorganization of the judicial system are set forth.—Ed.]

THE new judiciary act of March 3, 1911, supersedes the Ellsworth act of September 24, 1789. The act of 1789 was historic. It established a system of legal jurisprudence previously unknown to the world. It created the legal machinery for the first real constitutional court in history. It was the concrete demonstration of a political philosophy that made the judicial power one of the co-ordinate branches of the government of a free people.

It was experimental, and was therefore necessarily tentative in character. Of precedents for such a system there were none. Like all philosophical experiments, its weaknesses must be disclosed by practical demonstrations, and its real value be determined by its adaptability to the changing needs of a progressive nation.

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HON. REUBEN O. MOON

To explain the reasons for the reorganization of this judicial system, it will be necessary for me to allude briefly to the history of the judicial scheme provided for by the Constitution of the United States, and completed by the various acts of Congress relating to the judiciary. The constitutional provisions respecting a Federal judiciary are as follows:

Section 1 (Article III.). The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and betwen a state, or the citizens thereof, and foreign states, citizens, or subjects.

Paragraph 8, section 5 of Article I., under the enumerated powers of Congress, provides that the Congress shall

have power to constitute tribunals inferior to the Supreme Court.

The Supreme Court is created by the Constitution itself, and one of the first acts of Congress was to establish the number of judges of which the Court should be composed; to assign to it jurisdiction, and to create, define, and invest with jurisdiction such inferior courts as were necessary to discharge the duties of this co-ordinate branch of the government.

### Judiciary Act of 1789

On the first day of the opening of the first Congress there was introduced in the Senate, by Oliver Ellsworth, of Connecticut, a bill for this purpose, which became a law on September 24, 1789, and is known in history as the judiciary act of 1789.

After providing that the Supreme Court of the United States should consist of one chief justice and five associate justices, and conferring upon it original jurisdiction in two classes of cases, and vesting in it final appellate jurisdiction in all cases, this bill proceeded further to divide the entire territorial domain of the United States into judicial districts, and to establish therein a court, to be known as a district court, and to provide for each court a judge, to reside within the district, who should be known as a district judge, and to invest this court with certain jurisdiction in both civil and criminal causes. The next provision of the bill was to group the districts so created into three circuits, to be known as the middle, eastern, and southern circuits, and to confer certain jurisdiction upon these courts in both civil and criminal causes, and in addition to this original jurisdiction to invest the circuit court with an extensive appellate jurisdiction from the district court, and to provide that such circuit court should consist of two Supreme Court justices and the district judge previously provided for.

It will be observed that this act, although it created judicial circuits, did not create the office of circuit judge, but provided, as before stated, that the judicial authority in these circuits should be exercised by two Supreme Court justices and the district judge; and in this connection I desire to state that the office of circuit court judge was not created by Congress for a period of eighty years, or until 1869, except the creation of the so-called midnight judges, by the act of 1801, which was repealed as one of the first acts of the Jefferson administration, and never went into effect.

### The Original Supreme Court.

Immediately after the act of 1789 became law, George Washington, President of the United States, appointed John Jay, of New York, chief justice of the Supreme Court, and the following named persons accepted commissions as associate justices: John Rutledge, James Wilson, William Cushing, John Blair, and James Iredell.

The Supreme Court of the United States met for the first time in the city of New York on the first Monday in February, 1790, and organization was perfected by appointing a clerk, and the court then adjourned for want of business.

The simple and unimposing ceremonies of the opening of this great tribunal gave little promise of its future greatness, and it may be interesting to read a few lines of description of that momentous event from the pen of a very distinguished member of my own bar, the Honorable Hampton L. Carson, author of "A History of the Supreme Court of the United States." Mr. Carson says: "Not a single litigant had appeared at their bar. Silence has been unbroken by the voice of counsel in argument. The table was unburdened by the weight of learned briefs. No papers were on file with the clerk. Not a single decision, even in embryo, existed. The judges were there; but of business there was none. Not one of the spectators of that hour, though gifted with the eagle eye of prophecy, could have foreseen that out of that modest assemblage of gentlemen, unheard of and unthought of among the tribunals of the earth, a court without a docket, without a record, without a writ, of unknown and untried powers, and of undetermined jurisdiction, there would be developed within the space of a single century a court of which the ancient world could present no model and the

modern boast no parallel; a court whose decrees, woven like threads of gold into the priceless and imperishable fabric of our constitutional jurisprudence, would bind in the bonds of love, liberty, and law the members of our great Republic. Nor could they have foreseen that the tables of Congress would groan beneath the weight of petitions from all parts of the country, inviting that body to devise some means for the relief of that overburdened tribunal whose litigants are now doomed to stand in line for a space of more than three years before they have a chance to be heard."

So little was known of the potential powers of this new tribunal, thus so inauspiciously ushered into existence, that the great lawyers of the country had little aspiration for appointment upon its bench. George Washington, in the short period of his administration, appointed three chief justices, two of whom voluntarily resigned to accept positions more congenial to their judicial tastes. The jurisdiction of the Supreme Court provided by the act of 1789 was almost wholly appellate. The Court was in existence and ready to discharge its high functions, but, as Mr. Carson has so eloquently explained, there was not a single case upon its docket, and the first work of the Supreme Court justices was therefore done on the trial of cases in the exercise of the original jurisdiction of the circuit court.

### The Circuit Courts.

To carry out the provision of the judiciary act, which assigned two Supreme Court justices to each circuit, Chief Justice Jay and Associate Justice Cushing took the eastern circuit, Wilson and Blair the middle circuit, and Rutledge and Iredell the southern circuit, and in this capacity and in this order they began to lay the foundation of that judicial system which was soon destined to command the wondering admiration of the philosophical historian, and to challenge the respect of the tribunals of the world.

The work in its beginning was strenuous and exacting, and I have no doubt that the difficulty in obtaining lawyers willing to accept this exalted position was in no small degree due to the rigors and hardships incident to this peripatetic judicial life. William Wilson, of Pennsylvania, one of the framers of the Constitution, and one of the greatest lawyers of his day, and one of the most illustrious of the Supreme Court justices, lost his life while traveling in the southern circuit to assist his brother Iredell in the work of that circuit. But the foundation of our great judicial system was laid by these men in the circuits. Many of the most important trials in our early history were conducted by the justices of the Supreme Court in these circuits. The memorable trial of Aaron Burr for treason was held in the circuit court at Richmond, Virginia, with John Marshall, then Chief Justice, presiding, and in the trial of that case was established by him a legal definition of treason which has become the recognized law of the land.

These were the palmy days of the circuit court. The people of the states knew little of the central court at Washington, and they resented its existence; they feared its power. They were slow to recognize the necessity of a court outside of the jurisdiction of their own state, and administering laws other than the laws of their own creation, and the sessions of the circuit courts in the various towns and cities in the circuits where it was held were made the occasion by the justices of the Supreme Court of acquainting the people with this new dual system of government, of reconciling them to Federal jurisdiction, and of enlightening them upon the chief political topics of the day. It was known long in advance, and on that day the people from the surrounding towns and cities flocked to the courthouse to witness the great sight of the opening of the circuit court, upon the bench of which sat two justices of the Supreme Court and the judge of the district court. An extract from a newspaper entitled, "The United States Oracle of the Day," published at that period, describes the opening of the circuit court in Portsmouth, New Hampshire, as follows: "Circuit court. On Monday last the circuit court of the United States was opened in this town. The Honorable Judge Paterson presided. After the jury were impaneled the judge delivered a most elegant and appropriate

charge. The law was laid down in a masterly manner. Politics were set in their true light by holding up the Jacobins as the disorganizers of our happy country and the only instruments of introducing discontent and dissatisfaction among the well-meaning parts of the community. Religion and morality were pleasingly inculcated and enforced as being necessary to good government, good order, and good laws; for 'when the righteous are in authority, the people rejoice.'

"We are sorry that we could not prevail upon the honorable judge to furnish a copy of said charge to adorn the pages of the United States Oracle.

"After the charge was delivered, the Rev. Mr. Alden addressed the throne of grace in an excellent and well-adapted prayer."

To the lawyer of the present day, familiar with the crowded calendar, the business atmosphere, and the rapid performance of judicial duties in our Federal courts, this picture of a court holiday, a political address from the bench, and a closing prayer, affords a striking commentary upon the changes wrought in judicial procedure by the lapse of a hundred years.

### The District Courts.

The district court was inaugurated with no imposing ceremonies; it was unostentatiously domiciled in the cities and towns of the country. The judiciary act of 1789 had created the district as the unit of the Federal judicial system. The territorial area of the country was divided into thirteen judicial districts, and a district judge was appointed in each, who was required by law to be a resident of the district from which he was appointed.

The jurisdiction of this court, both civil and criminal, was extensive,—exclusive in some cases,—and concurrent with the circuit court in a large additional class of cases, both at common law and in equity.

The definite location of this court, the fact that the judge was a resident within the district, and that it came more intimately in touch with the people of the various states and reached their most frequent needs, tended to popularize this new tribunal and to reconcile the people to the hitherto strange Federal jurisdiction. The additional fact that the district judge was also a constituent member of the circuit court and participated in the work of that court at all of its sessions laid a foundation for the recognition and development, in the state and among the people, of the necessity and adaptability of a dual system of jurisprudence, and led to an understanding of the principles of an allegiance to two district sovereignties,—a state and a Federal.

### Experimental Nature of Federal Judicial System.

The Federal judicial system thus launched and thus organized was an experimental one. It had no precedent in the judicial history of the world. Experience and actual trial could alone test its defects or give assurance of its wisdom. Tested by actual experience in the field of its operation, weaknesses were developed and acts of Congress from time to time passed to correct them. The Supreme Court had practically no original jurisdiction, and was created by the Constitution as a court of last resort on appeal. Its supreme exercise of appellate power was the basis of its existence.

The circuit court, in addition to its original jurisdiction, was also a court of extensive appellate jurisdiction, the judiciary act having vested in it appellate jurisdiction in all cases arising in the district court where the amount involved exceeded the sum of $50, and in all cases of admiralty and maritime jurisdiction where the amount involved exceeded $300.

The district court was the only court whose jurisdiction was wholly original. As I have before stated, when this judicial system was inaugurated, there was no appellate jurisdiction to be exercised by either the Supreme Court or the circuit court. No case had been tried. No errors had been committed. No ground existed anywhere for appeal.

This fact was apparent, and therefore no circuit judges were created. The Supreme Court became a court of nisi prius, and the justices went out into the

judicial circuits in a series of state trials to enforce the laws in the exercise of its original jurisdiction, and to make the records out of which should grow the appeals which should finally be adjudicated by them as justices of the Supreme Court in the exercise of that appellate jurisdiction. But, even the constitutional right of a Supreme Court justice to sit in the circuit court was so uncertain that it at one time became of itself a subject of litigation; and in a noted case, the case of Stuart v. Laird, reported in 1 Cranch, Chief Justice Marshall seriously questioned the constitutionality of such an assignment, but decided that practice and acquiescence for a period of many years, commencing with the organization of the judicial system, had fixed the construction, and that this contemporary and practical exposition was too strong to be shaken or controverted.

### Growth of Federal Jurisdiction.

The country expanded rapidly. New and vast subjects for the exercise of Federal power by the courts were developed, and what was originally supposed by the founders of the government to be a limited Federal jurisdiction became one of stupendous scope. The docket of the Supreme Court, originally without an entry, began to grow. The judges of that court were necessarily gradually withdrawn from the circuit. The fact that certain members of the court had sat in the original case out of which grew the pending appeals tended to weaken the force of their final adjudication.

The trial of causes in the district court began to multiply, and as these dockets increased in size appeals from its decisions became more and more numerous, and thereby the appellate work of the circuit court rapidly grew. It can be easily understood that the gradual withdrawal of the Supreme Court justices from the circuit court devolved more and more work of that court upon the district judge, because it must be remembered that, up till this time, there was no circuit court judge created, and that the district court still consisted of a supreme justice and a district court judge.

As early as 1792 Congress modified the necessity for the constant attendance of the Supreme Court justices in the circuit court; and by the act of 1793 they limited to one, instead of two, the number of Supreme Court justices that should compose the circuit court, such action having been made necessary by the gradual growth of the docket of the Supreme Court itself.

This unsatisfactory condition of the judicial system was intensified as the years went on and the country increased and subjects of Federal jurisdiction multiplied, until, by the act of April 10, 1869, a practical reorganization of the system was effected.

### Reorganization Act of 1869.

It was provided by that act that there should be created a circuit judge in each of the nine circuits, who was given the same power as that possessed by the justice of the Supreme Court allotted to that circuit; it also further provided that thereafter the circuit court in each circuit should be held by the justice of the Supreme Court allotted to that circuit, or by the circuit judge, or by the district judge of the district sitting alone; and by a further provision it limited the duties of the Supreme Court justice in the circuit court to a visit once in two years.

The change in our system of jurisprudence as effected by this act can be readily seen. The pristine dignity of the circuit court was diminished by the loss of the Supreme Court justice. Its real usefulness was increased by the addition of a circuit judge, who would always be present in the circuit. Its future extinction was foreshadowed by the fact that its whole functions might thereafter be discharged by a district court judge sitting alone.

Let us observe for a moment a practical operation of this system under the act of 1869. The justices of the Supreme Court of the United States were practically withdrawn from the circuit, their time wholly occupied in the discharge of their constitutional powers as the court of last appeal. The circuit court of the United States, with an appellate jurisdiction from the district court, was largely occupied in the exercise of that jurisdiction. It had but one circuit judge in a circuit of vast area, yet it still possessed and must still exercise a large original jurisdiction, and it might be, and

frequently was, constituted by a district court judge sitting alone. The district court continued to exercise the original jurisdiction conferred upon it by the act of 1789, and by the large number of acts of Congress passed since that time by which such increased original jurisdiction has been conferred.

This was the state of our judicial machinery and its practical operation after that time. Unsatisfactory as such a system doubtless was, and unsystematic in its distribution of the judicial business of the country, and imperfect in its power to administer the Federal law, little complaint was heard as to its operation. But a new difficulty arose,—one doubtless entirely unforeseen by the framers of that system. The marvelous expansion of Federal power, created by acts of Congress and judicial construction; the marvelous creation of new arts; the invention and application of new agencies in commerce and in the industries; the rapid settlement of the country and the phenomenal increase in population,—so rapidly multiplied the number of cases brought to the Supreme Court of the United States that its dockets became overcrowded. The Court was utterly unable to keep pace with the judicial growth of the nation. Justice was so long delayed, and the settlement of the new legal principles so constantly arising and so essential to the national growth so long deferred, that Congress was petitioned from all sections of the country for relief and redress.

### Circuit Courts of Appeals.

This universal demand for relief resulted in the introduction into the House of Representatives a few months later, in April, 1890, of a bill entitled: "An Act to Define and Regulate the Jurisdiction of the Courts of the United States." This act provided in the first section for the total abolition of all of the original jurisdiction of the circuit court of the United States, and the vesting of that jurisdiction in the district court.

It provided further for the creation in each judicial circuit of the United States of a court to be known as the circuit court of appeals, to consist of three judges in each circuit. The jurisdiction of this circuit court was to be wholly appellate, and was formed by taking from the existing circuit court all of the appellate jurisdiction exercised by it, and by taking from the Supreme Court of the United States exclusive appellate jurisdiction in a very large number of cases then vested in that court; and it also further provided for the creation of eighteen additional circuit judges to fill the positions created in the new court.

This bill was reported from the Judiciary Committee, and was passed by practical unanimity in this House (only thirteen votes being recorded against it) on the 15th day of April, 1890, and was sent to the Senate of the United States. That body did not concur in the bill. It devised a different method for relieving the pressure upon the Supreme Court. It followed practically the provisions of the House bill in the creation of the nine new appellate courts. It refused to adopt that portion of the bill which abolished the original jurisdiction of the circuit court.

This bill came back from the Senate in the closing days of the Congress, and on the 3d day of March, 1891, the day before the expiration of that Congress, the report of the conference committee was brought before the House for consideration. The House at that time was very reluctant to accept the amendment of the Senate bill, and several members of the House having charge of the bill declared that their only reason for acquiescing in the conference report, which accepted the Senate provisions, was that the necessity for the relief of the Supreme Court was so great that something must be done at once, and that to refuse to accept the Senate amendment at that time would necessarily defer the adoption of any act for its relief, and that they adopted the bill with the Senate amendment, with full knowledge of the fact that it left the judicial system in a defective condition, and with the evident expectation that a future Congress, at some early time, would correct the mistake that they were then making.

This act of March 3, 1891, did relieve the Supreme Court of the United States. The new courts of appeals have become great courts, useful and effective. They exercise final jurisdiction in a very large

number of cases, with entire satisfaction to the whole country. But the defect of that act in continuing the original jurisdiction of the circuit court has grown more and more obvious year by year.

### Present Status of Federal Courts.

The present status of the courts of the United States, under the act of 1789 and the amendments thereto, is as follows:

One Supreme Court, consisting of a chief justice and eight associate justices.

Nine circuit courts of appeals, one in each judicial circuit, consisting of three judges each.

Seventy-seven circuit courts, one in each judicial district.

Seventy-seven district courts, which are required by acts of Congress to be held in 276 different places.

There are now twenty-nine circuit judges, who are qualified by law to perform the work of both the circuit courts and the circuit courts of appeals.

There are ninety district judges, who are required by law to perform the entire work of the district courts, and who by the act of 1869 are qualified to hold a circuit court sitting alone, and by the act of 1891 are made constituent parts of the circuit courts of appeals.

There are, in addition to these courts of general jurisdiction, three special courts of the United States,—a court of claims, created by the act of 1855, consisting of a chief justice and four associate justices; a court of customs appeals, created by the act of 1909, consisting of a presiding judge and four associate judges; and a commerce court, created by the act of 1910, consisting of five circuit court judges, who are especially provided for in the act.

These courts, however, are courts of limited jurisdiction, created for special purposes, and their powers and functions are derived entirely from the acts creating them.

As has been seen, by acts of Congress, in each of the 276 places in which the courts must be held, there is a provision for holding both the circuit and district court, and in each of these 276 places are maintained the organization and machinery of these two respective courts, both of which are courts possessing only original jurisdiction.

The jurisdiction conferred by acts of Congress upon these courts is, in a large majority of cases, concurrent, and in a comparatively few cases is exclusive jurisdiction conferred upon them. This jurisdiction differs very little in character, and is distinguished by no controlling principle. They both have jurisdiction of civil and criminal cases, the only distinction being that the circuit court has exclusive jurisdiction in capital cases. In some cases the line of demarcation is simply the amount involved in the litigation; in some cases there exists a mere arbitrary division, giving the admiralty and maritime jurisdiction exclusively to the district courts, and matters relating to revenue to the circuit courts; and during the past twenty-five years few, if any, acts of Congress have been passed that conferred jurisdiction upon courts in which the same jurisdiction has not been conferred upon both the circuit and the district courts. The chief distinction in principle between the circuit and district court as created by the act of 1798 was that the circuit court was then invested with a large appellate jurisdiction from the decisions of the district court, and when the act of 1891 took away from the circuit court this appellate jurisdiction there no longer existed any reason, in law or in principle, for its continuation.

### Decadence of Circuit Court.

It is true that the circuit court is an historic court. But the glory of its early days necessarily rapidly declined. The act of 1793, which withdrew one of the justices from the circuit, weakened its importance. The act of 1869, which created the circuit court judge, and made the district judge alone competent to hold a circuit court, and practically withdrew both Supreme Court justices, pointed to its rapid decadence. The act of March 3, 1891, which took from it all of its appellate jurisdiction and relegated it to a court of limited scope and powers already exercised by the district court, completed its final overthrow, and made the House bill of 1890, which provided for its entire extinction from the judicial system, a matter of prime necessity.

Let us examine carefully the actual operations of the two courts as they exist

side by side in every subdivision of every district throughout the country to-day, numbering 276. In this vast territory there are twenty-nine circuit court judges —residing in nine judicial circuits—upon whom is devolved the large and rapidly increasing labors of nine circuit courts of appeal. The eighth judicial circuit embraces thirteen states, comprising an area vastly greater than that occupied by the whole nation when the judiciary act of 1789 was passed. The ninth judicial circuit exercises, in addition to its regular jurisdiction, appellate jurisdiction from the treaty court in China, and the district courts of the Hawaiian Islands, and is the supreme court of the district of Alaska. The third judicial district is about to assume appellate jurisdiction from the courts of Porto Rico. A circuit court judge who sits in the trial of causes in his court of original jurisdiction is disqualified from sitting in his circuit court of appeal when such cases come before it, and in order to maintain a full bench a district judge in the circuit must be taken from his work in the district to sit with the other circuit court judges.

### District Courts Adequate.

In every district resides a district judge. Under the act of 1869 he is as fully qualified to hold a circuit court sitting alone, as is the circuit court judge. He is equally learned in the law. He has a better acquaintance with the people and the environments of the causes arising in the district, and he has the time to transact the business, and he has now for a number of years conducted these courts to the entire satisfaction of the respective communities and to the honor and credit of the government; while if the twenty-nine circuit court judges should attempt the impossible task, it would so delay and obstruct the work of the circuit court of appeals as to defeat the purpose of the act of 1891, and would bankrupt the judges themselves to pay their traveling expenses. Yet, because under existing laws certain exclusive original jurisdiction is given to the circuit courts, there is necessarily maintained in every district of the United States, and in every division thereof, the complete machinery of a circuit court, consisting of court rooms, clerks, dockets, marshals, and all of the extensive and expensive features of a court organization. The commingled jurisdiction between it and the district courts is perplexing and oftentimes confusing to litigants and attorneys. Its exclusive jurisdiction is not based upon any organic principle of distinction, and there exists no longer any reason, either in theory or practice, why the original jurisdiction of this court should be maintained.

### Elimination of Circuit Court.

The reorganization of the courts, therefore, as provided by the new act substitutes for the present cumbersome, impracticable, confusing, and expensive judicial system a simple, concrete, elastic, and logical one; it eliminates a court of original jurisdiction wholly unnecessary and in practical operation long since fallen into disuse. It does not displace a single judge or change the present general practice of the courts. It simplifies the proceedings by consolidating jurisdictions and by having all cases in courts of first instance and all pleadings filed therein brought and filed in the district court, and preserves the same plan of judicature originally designed by the framers of the Constitution and adopted by most of the states, to wit, one court of original jurisdiction, an intermediate court of appellate jurisdiction—final in many cases—and the Supreme Court as the court of last resort.

### Other Changes.

In addition to the reorganization of the Federal judicial scheme by the elimination of the circuit court, other important changes are made by the new judiciary act. It removes many obscurities by conforming the language of the acts to judicial interpretations made by the Supreme Court of the United States. It eliminates redundant statutes, repealed statutes, and statutes declared to be unconstitutional, and supplies many omissions in existing law. It relieves the crowded dockets of the Supreme Court by taking away its jurisdiction in capital cases, in copyright cases, and in a very large number of cases that came to it from the District of Columbia, which by existing law may be carried to that court, in most cases involving an amount in excess of $5,000.

# The United States Court of Claims

BY HON. GEORGE W. ATKINSON

Associate Judge of the Court of Claims

THE court was established by an act of Congress approved February 25, 1855, consisting of three judges with life tenures at salaries of $4,000 each. Their salaries, however, have been increased since that time and are now $6,000 each. In March, 1863, the jurisdiction of the court was enlarged and the number of judges was increased to five, which number compose the court at this time. It was intended to be and is the government's own court,—its court of exchequer, so to speak,—and therefore has the broadest possible jurisdiction. The name given to it, however, is in reality a misnomer, which among many people, including lawyers, has created a false impression as to the scope and character of its duties, its powers, its jurisdiction, and its workings. Many able lawyers have told me that they had believed it to be only a so-called court whose principal business was to hear and audit claims against the United States. They did not know, nor do but few lawyers outside of the District of Columbia know, that its jurisdiction embraces not only Continental America, but extends to all of our insular possessions, and that scarcely any legal question (except torts) which is or can be raised in any other court of the land can be and is raised in this court, and that its judgments, where no appeals are taken, are conclusive of the rights of the parties to a suit, and are as binding as the judgments of the Supreme Court itself.

If judgment against a claimant in any case where the amount in controversy exceeds $3,000 is rendered, he may, within ninety days thereafter, appeal to the Supreme Court on alleged mistakes of law; and the United States may appeal in like manner from any judgment adverse to the government, without reference to the amount in controversy.

### Original Jurisdiction of the Court.

The organic act of 1855 gave to the court jurisdiction to hear and determine "all claims founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States, and all claims which may be referred to it by either House of Congress."

That jurisdiction continues to the present time, except as it is affected by a statute of limitations inserted in the act of March 3, 1863, by which it was provided that "every claim against the United States cognizable by the court of claims shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues;" saving the right upon claims then already accrued to file the petition within three years after the passage of the act, and also the rights of certain persons under disability.

The consequence of this limitation is that claimants now go to Congress with their petitions for redress in matters of claims to which this exclusion from the court of claims applies, and in some special cases Congress has waived the statute in their behalf.

### Extension of Jurisdiction.

The same act of 1863 gave to the court jurisdiction of "all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatever on the part of the government against any person making claims against the government in said court." Under this provision the United States have obtained judgment against individuals in several cases, and in certain railroad cases they have recovered more than a million of dollars.

By the act of May 9, 1866, the jurisdiction of the court was extended "to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from respon-

sibility on account of losses, by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, and papers in his charge, and for which such officer was and is held responsible;" with authority to enter a decree for his relief, to be certified to and allowed by the accounting officers of the Treasury as a credit whenever the court "ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer."

The jurisdiction of the court was further extended by the act of June 25, 1868, so as to authorize the head of any Executive Department, or the Secretary of the Treasury, on the certificate of any auditor or comptroller, to transmit to the court for hearing and adjudication any claim belonging to one of the classes of which the court might take jurisdiction, on the voluntary action of the claimant, "whenever the same involves disputed facts or controverted questions of law, where the amount in controversy exceeds $3,000, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount in controversy in any particular case; or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States."

It has been decided by the Supreme Court that the six years' limitation imposed by the statute in other cases does not apply in this court to cases thus referred, where the claimant had presented his claim to the department within six years after it had accrued.

### Aliens can Prosecute Suits.

Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts have the privilege of prosecuting claims against the United States in the court of claims, whereof the court, by reason of their subject-matter and character, might take jurisdiction. It has been judicially determined by decisions already made, that under this provision the right to sue in this court is accorded to citizens of Prussia, Hanover, Bavaria, Switzerland, the Netherlands, the Hanseatic Provinces, the free city of Hamburg, Spain, Belgium, Italy, and Great Britain, and it no doubt belongs to the citizens of other countries as well.

The jurisdiction of the court is restricted as to certain claims for or in respect of which the claimants have pending in other courts suits against persons who at the time the causes of action occurred were acting, or professing to act, under the authority of the United States, and certain claims growing out of treaties.

These provisions confer the general, continuing, and permanent jurisdiction of the court. They may be found, with their incidental regulations and details, in chapter 21 of the Revised Statutes of the United States, §§ 1059 to 1093 inclusive.

But Congress has, from time to time, given to the court jurisdiction, for a limited period, in particular classes of cases, and has, by special acts, referred many single claims to the court for adjudication, many of which involve intricate legal problems and large sums of money, —sums running up into many millions.

### French Spoliation Claims.

In 1885 Congress referred to this court all French spoliation claims arising out of illegal captures, detentions, seizures, condemnations, and confiscations, prior to the ratification of the convention of the United States and the French Republic concluded on the 30th of September, 1800. This class of cases involves the most intricate questions which arise out of treaties, and covers the entire field of international law; and as court decisions establish precedents, each case (and there are hundreds on hundreds of them) must be searchingly considered before an opinion is written thereon. I can say without boasting, because it is admittedly true, that the decisions of the court of claims on international law questions are of great value to this branch of American jurisprudence, and are often quoted with approval by learned jurists in this very difficult branch of the laws of nations. I have found it a broad and delightful field of study and research dur-

ing the five years of my connection with the court, and yet I have found it to be a most difficult branch of the law to attempt to compass.

The volume of business transacted by this court is very large, and when one takes into consideration the fact that the judges must pass upon the facts as well as upon the law of every case on trial, it can be readily seen the amount of time and thought required of each member of the court. I excerpt from the Attorney General's report to Congress for the fiscal year ending June 30, 1909, which is the latest one made by him, some of the more important facts relative to the workings of the court.

### General Jurisdiction Cases.

There are now pending 3,470 general jurisdiction cases on the docket. Since the report of the preceding year (1908) 268 new cases have been added wherein the amount claimed is $26,954,700. During the year 164 cases were disposed of claiming $3,019,164.98. Judgments dismissing 25 of them were entered amounting to $264,657.14, and in 74 cases judgments were entered against the United States amounting to $457,664.84. The court also disposed of 91 Spanish War soldier cases, rendering judgments in favor of the claimants. Nine Philippine War claim cases were also disposed of, in seven of which judgments were in favor of the claimants and two against them.

There are certain cases of special interest, both by reason of large amounts involved and principles in issue affecting a class of cases which are not included in the foregoing summary. In some instances the questions of law in several thousand cases pending on the dockets of the court are determined by the decision in one case which is given a general number, all others of like character are subnumbered, and they do not appear in the above summary.

There is a gradual increase in the volume of business involved in general jurisdiction cases. In seeking to ascertain the source from which this increase emanates, it would be misleading to include the amount claimed in the case of the Missouri, Kansas, & Texas Railway Company, filed May 17, 1907, wherein judgment is prayed for $61,287,800. In a case of this magnitude, the record will probably cover 3,000 to 4,000 printed pages. Exclusive of this case, 208 petitions were filed in 1907, claiming in round numbers $4,730,000. In 1908 there were filed 225 petitions aggregating $7,467,000, while the present report for the year ending June 30, 1909, shows 268 petitions claiming in the aggregate $26,954,700. This *data* does not include many subnumbered cases and amounts involved therein, which are dependent upon some one "class case."

### Cases Under the Law of Eminent Domain.

Using the year 1902 as a basis, an examination of the records shows an annual average increase of business for the past seven years of 59½ per cent over the volume of business filed in 1902. In this computation the Missouri, Kansas & Texas case is not considered. The increase may be accounted for in part by a number of cases growing out of the improvement of the Mississippi river. This work, under the general direction of the Secretary of War and in accordance with the specifications and recommendations of the Mississippi River Commission, furnishes a line of most important and interesting litigation, by reason of the alleged destruction and taking of property in the prosecution of such work. Certain questions which do not arise in the improvement of other rivers, such as were present in the Lynah Case (188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349), are presented in Misssissippi river claims: Whether the general government has assumed permanent control of the river; whether the taking of land along and adjacent to the river in the state of Louisiana for the purpose of constructing and on which to construct levees is done under the power of eminent domain. The government contends, among other defenses, that under Spanish and French control of the Mississippi valley all alluvial and batture land was owned by those nations; that when this territory was transferred to the United States by the French government such alluvial and batture land became vested in the Federal government for the purpose of building levees, and in turn

became vested in the state of Louisiana upon its admission into the union of states, and therefore that said alluvial and batture land was never owned in fee by the riparian owner; that attached to said lands there has been and is a servitude or easement running to the state of Louisiana whereby the same are subject to be taken for the purpose of constructing or on which to construct levees. This servitude or easement is reserved to the state of Louisiana by the terms of its Constitution. It is further contended by the government that such servitude was transferred to the Federal government by the terms of article 215 of the Constitution of 1879 of the state of Louisiana, and therefore the riparian owner is without right of recovery.

In many instances the constructions for improving the river and protection to the adjacent land were erected by state and municipal authorities, and by private parties, and these improvements have become intimately connected with and form a part of the improvement undertaken by the Federal government. Where destruction by overflow or taking of the land for levees and on which to construct levees is the result of such work, the liability of the government is in question.

There are now pending on the docket of the court 83 Mississippi river cases, wherein it is claimed that 94,222 acres of land valued at $9,672,641 have been destroyed, taken, and rendered valueless by reason of said improvements.

### Congressional Cases.

The court from year to year is almost overwhelmed with what are termed "congressional cases" sent down by Congress under the Bowman and Tucker acts. These claims are for property taken or destroyed by Federal troops during the Civil War. The court can do nothing with this class of cases except to simply find the facts and return the same to Congress, which body can pay or reject them as it sees fit so to do. The court cannot render a judgment or enter a conclusion of law in such cases, and yet it is almost continuously abused by uninformed Congressmen and Senators for doing what it has never done and cannot do, *viz.:* render judgments in this class of cases.

There have been submitted to the court during the fiscal year 1908-9 approximately 4,000 of these claims which have been classified under 383 general numbers. It is impossible to ascertain from the petitions and other papers the exact amount claimed, but from the *data* furnished the aggregate considerably exceeds $10,000,000. Embraced in the above are a large number of cases known as "class cases," where many claims are designated under one docket number, a separate petition bearing a subnumber being filed in the name of each individual claimant. The total number of claims transmitted under this jurisdiction, according to their docket numbers, is 14,252, of which there are now pending 2,030. This does not include subnumbered claims composing a class of cases docketed under general numbers.

### Departmental Cases.

There is still another class of cases which involve no inconsiderable amount of the thought and time of the court, which are known as "Departmental cases." These cases come to the court by reference from the various Executive Departments. They are generally what is known as "class cases," which involve constructions of the laws of Congress which most generally but not always relate to the Army and Navy. To a casual observer, it would seem that such matters would be inconsequential. But when a judge sits down to carefully and thoughtfully pass on an act of Congress frequently very carelessly drawn, relative to the pay of an Army or Navy officer, and is confronted with a half dozen or more statutes bearing on the same subject, and not knowing whether Congress intended by the passage of one of these acts to repeal or only amend or modify other acts, he has a job that he does not desire to either buy or borrow. Opinions on matters of this kind are sent to the departments that solicit them, and must be adhered to unless they are overruled by the Supreme Court. During the past fiscal year 8 of these cases were heard by the court, in 7 of which opinions have been certified to the departments from

which the cases were referred. There are now pending 23 of these departmental cases, which will be passed upon when arguments are presented by counsel and decisions are requested thereon.

### Indian Depredation Cases.

The court also has exclusive jurisdiction over all depredations by Indians not only upon the property of white settlers in Indian sections, but for depredations by one tribe upon another. Being the wards of the nation, the government assumes responsibility for their unlawful acts, when the tribes are in amity; that is, when they are not upon "the war path." Many of our Indian tribes and bands are very difficult to keep within proper limitations. It is not uncommon for a band of young bucks to organize for unlawful purposes. They start out, not for purposes of war upon the whites, but purely for pillage and plunder, when the tribe itself is in entire amity. These marauders perform their deviltry usually in the night. They mount their ponies, visit ranches, steal horses, cattle, and sheep, burn houses and barns, and then ride into the surrounding mountain fastnesses at an unusually rapid rate. They attack a ranch at midnight, and will be 50 miles away by day dawn. Their ponies are swift in movement, and possess wonderful endurance, and the bucks themselves are swift of foot, and rarely, if ever, tire when pursued by the "pale face," whom the majority of the tribes regard as their natural enemy. If they would only confine themselves to the property that they could easily carry with them, the damages they inflict would be comparatively small; but their natural penchant seems to be to ruin everything in their wake. They invariably kill a lot of stock before they start on their retreats, burn everything they can before leaving, mount their fleet-footed steeds, kill the slow-traveling animals they have stolen, and make for "wild regions" where white men dare not tread; and they do not hesitate to kill, if they can, the party of men who pursue them. They seem to be born vandals, and enjoy the work of destroying, without the consequences of reward or punishment.

Their tribes are at peace with the white race, although they themselves are at war; but the United States, as their guardian, is responsible for their maraudings. Hence suits are brought in this court to recover the value of the property in this manner stolen or destroyed; and if, as I have said, the tribe to which they belong is a peaceful tribe, the government of the United States, as guardian of the Indians as a class, must pay for the damages thus inflicted.

Then again, it is not uncommon for renegades or irresponsible bands of one tribe to trespass upon and destroy the property of peaceful members of other Indian tribes, in the same manner that they raid upon the white citizens; the government must pay for their losses also. To the casual observer this seems to be wrong, and in a sense it is; but we have "Mr. Lo" with us, and as he is our "ward," Mr. Jones—who is "Uncle Sam"—has "to pay the freight."

When a tribe of Indians, however, as such, has declared itself in open rebellion against the authority of the United States, stealing, marauding, and killing, as is very often the case, the government is not responsible under the acts of Congress for its acts. It is only when a tribe is in *amity* that the government agrees to make reparation for the damages inflicted. The wisdom of the law is apparent, because it encourages the tribes to be law-abiding, for the reason that all damages done by members or bands of a tribe are charged to and deducted from the government allowances made by Congress to that particular tribe. Annuities, however, are not withheld from them. While "Uncle Sam" pays for property unlawfully taken by members, in the end the tribe itself must pay the debt.

The total number of these Indian depredation claims filed in the court has been 10,841, involving an amount claimed of $43,515,867.06. During the past year 505 cases have been finally disposed of, the aggregate amount claimed in such cases being $1,822,621.61. The amount of all judgments recovered for the year by the claimants was $38,565. There are 1,175 of these cases now pending. In the end "Mr. Lo" will get what is coming to him from the court, and no more.

### How Cases Are Disposed of.

All cases are tried in the court of claims with the same formalties as are cases between individual litigants in the courts of common law as to the admissibility of evidence, the examination and cross-examination of witnesses, and the application of legal principles, and the rights of the United States and of claimants are guarded and protected by the established rules of law as administered in other courts.

The procedure and practice have been improved and simplified by congressional enactments, and by the rules adopted by the court from time to time, as suggested in the course of its experience of more than fifty years, until a system has grown up and become established of the utmost convenience to parties and counsel, wherever they may reside.

Claimants must file petitions properly setting out their cases, and must prove their claims by competent evidence. But as the court is held at Washington, and has jurisdiction of cases which arise in distant and different parts of the country, Congress has provided that the testimony shall be taken in the county where the witness resides, when the same can conveniently be done.

When, therefore, a claimant has filed his petition, which he may do by sending it to the clerk of the court by mail or otherwise, he may, at his leisure and convenience, go on taking the depositions of witnesses whenever and wherever he can find them, first giving notice to the Attorney General that he may be present himself, or by an assistant, to cross-examine them.

The court is authorized by law to call on any of the departments for any information or papers it may deem necessary, and it always does so in proper cases on motion of claimants; and thus they can readily obtain whatever information and evidence affecting the issues involved which are contained in the archives of the government.

Parties filing petitions, pleadings, and motions, except motions for calls on the departments, are required by the rules to leave with the clerk at the same time written notice thereof, addressed to the attorney of the adverse party, with postage prepaid, and the clerk is required to mail the same, and to note the fact on the general docket; and all notices may be served in the same manner. Printed blanks are furnished to parties for this purpose. Upon the receipt by the clerk of an answer to a call upon a department, he is required also to notify the claimant's counsel and the Attorney General of the fact by mail. By these rules, attorneys in any place, however distant from Washington, are informed at once, and therefore always know of every paper filed in their cases without being obliged to watch the state of the clerk's docket.

When the claimant has closed his proof, he may give notice to the Attorney General to that effect, by an entry in the notice book, in the clerk's office. In two months thereafter, unless the Attorney General asks for further time, the claimant may have his case placed on the trial list.

Before a case is placed on the trial list, however, the claimant must file in the clerk's office twenty-five printed copies of his brief and his proposed findings of fact, and the Attorney General has one month thereafter in which to file a brief and request for findings of fact on his part.

If counsel live at a distance, the court will, on application, assign a day certain for the hearing of his case, so that he need not be detained, as he may be in other courts, awaiting his turn; or he may file his request for findings of facts, briefs, and argument by forwarding them to the clerk by mail, and thus he may be relieved from going to Washington at all during the progress of the case, from beginning to end of the proceedings.

No fees or costs are taxed or allowed by the court, and if the claimant loses his case he is not subjected to a bill of costs, except that a statute requires the losing party to pay the cost of printing the records. Of course, a party must pay for the taking of the depositions which he himself requires in establishing his claims, but if defeated he is not required to pay for taking depositions of his adversary.

The evidence is printed at the Government Printing Office, and that and all

other documents in each case are made into records for the use of the court and the parties.

The court has no jury. All questions of law and of fact are submitted to the five judges, and each judge reads over the whole record, so that there is not the same necessity for oral arguments as in the common law courts, and yet oral arguments are made by counsel in all important cases. The court sits four days out of every week for this purpose.

**Charles O'Connor's Opinion of the Court.**

Many years ago the late Charles O'Connor, of New York, one of the ablest lawyers this country has ever produced, in speaking of the court of claims, among other things said:

"The court itself is the first born of a new judicial era. As a judicial tribunal, it is not only new in the instance; it is also new in principle. So far as concerns the power of courts to afford redress, it has heretofore been fundamental that the sovereign can do no wrong. This court was erected as a practical negative upon that vicious maxim. Henceforth our government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be.

"Prior to the institution of this court, all rights as against the nation were imperfect in the legal sense of the term; every duty of the nation was a duty of imperfect obligation. There was no judicial power capable of declaring either; no private person possessed the means of enforcing the one or coercing the other. But effectual progress has been made towards giving form and method to the administration of justice between the nation and the individual. This court enables the latter to obtain an authoritative recognition of his rights. No more is needed; for in no case can a state, after such a recognition, withhold payment and yet retain its place in the great family of civilized nations.

"The ordinary jurisdiction of the court bears a strong resemblance to the narrow cognizance at common law; but its extraordinary jurisdiction over all claims which may be referred to it by either house of Congress extends its power to the utmost limits attainable by judicial science in its fullest development. In this aspect, its dignity and importance as a governmental institution cannot be too highly appreciated. As a means by which rightful claims against the government may be readily established, and those not founded in justice promptly driven from the portals of Congress, it must exercise a most healthful influence."—From Address before West Virginia Bar Association, 1910.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice and be sued by individual citizens."—Judge William Cushing.

# Editorial Comment

A brief review of current topics


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Edited by Asa W. Russell.

## *The New Judicial Code*

THE new Federal Judicial Code enacted at the last regular congressional session, entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," proves upon examination to be much more than a codification of the existing laws.

The most sweeping change effected by this new enactment is the complete abolition of the circuit courts, which have been in existence ever since the original judiciary act of September 24, 1789, and the consequent investing of the district courts with all the jurisdiction heretofore exercised by the circuit courts. Speaking generally, the effect of this legislation is to remove the circuit judges from all work in the courts of first instance, and to confine their activities to their appellate duties on the bench of the circuit courts of appeals.

To meet the objection that, with the abolition of the circuit courts, it becomes no longer possible in insolvency, patent, and other cases to grant relief often vitally necessary which shall operate throughout an entire circuit, extending over a wide geographical jurisdiction much greater than that possessed by the district courts, it was at one time proposed to give the circuit judges and the circuit justices the powers and jurisdiction of a district judge throughout their respective circuits. But as finally enacted this amendment was rejected. The law, however, in § 56, does grant some measure of relief in this regard by extending the powers of a receiver over the entire circuit where the land or other property of a fixed character, the subject of the suit, lies within different states in the same judicial circuit, subject, however, to the disapproval of the circuit court of appeals or a circuit judge thereof within thirty days after the order of appointment. And the circuit judge, when the public interests demand it, may, under § 18, hold the district court, and by § 264 he is given the power, when the district judge is absent or unable to act, to grant an injunction or restraining order in any case pending in the district court which might have been granted by the district judge.

Under the new law, causes removed from the state courts now go to the Federal district courts. An unsuccessful attempt was made to include a provision which prevented the removal, on the ground of diverse citizenship, of suits against a corporation or joint stock company brought in the state court of the state in which the plaintiff resides or in which the cause of action arose, or within which the defendant has its place of business or carries on its business. But the new law does provide in § 28 that no case arising under the Federal employers' lia-

bility act brought in any state court of competent jurisdiction shall be removed to a Federal court.

The much discussed question of Federal jurisdiction of suits to suspend, enjoin, or restrain the action of state officers in the enforcement, operation, or execution of a state statute upon the ground of the unconstitutionality of such statute, was raised by an amendment at one time incorporated into the bill absolutely depriving the Federal courts of jurisdiction over such causes. As finally enacted, the Federal courts are not shorn of their power to grant injunctive relief in such cases. The Judicial Code does, however, in § 266, by re-enacting the provisions of § 17 of the act of June 18, 1910, place some restrictions upon the granting of interlocutory injunctions for this purpose. Such injunctions can, under these provisions, only issue upon application before three Federal judges, of whom one at least shall be either a justice of the Supreme Court or a circuit judge. Two of the three judges must concur in granting the application, and an appeal lies direct to the Federal Supreme Court from the order granting or denying the injunction.

The court of customs appeals and the commerce court are such recent additions to the Federal judicial system that, although not created by the Judicial Code, a brief mention here may not be out of place. The eighth chapter substantially re-enacts the provisions of § 29 of the tariff act of August 5, 1909, creating the court of customs appeals, which consists of a presiding judge and four associate justices appointed by the President by and with the advice of the Senate. This court has appellate jurisdiction generally to review decisions of the board of general appraisers in cases arising under the tariff laws. And the ninth chapter of the Judicial Code continues, with practically unchanged functions, the new commerce court created by the act of June 18, 1910, composed of five circuit judges to be assigned to that court, and to serve thereon not more than five consecutive years. Speaking generally, this court has exclusive original jurisdiction of proceedings to review orders of the Interstate Commerce Commission. An appeal lies to the Federal Supreme Court which shall be preferred over all other causes except criminal causes.

Among the other principal changes which the new law makes are these:

The right of appeal to the circuit courts of appeals from interlocutory orders in injunction cases is extended by § 129 to those interlocutory orders refusing or dissolving an injunction, or refusing to dissolve an injunction, in addition to those granting or continuing an injunction or appointing a receiver which have heretofore been appealable.

Changes are made by § 250 in the scope of the appellate jurisdiction of the Federal Supreme Court over the court of appeals of the District of Columbia.

Members of Congress are prohibited by § 144 from practising in the court of claims.

This Judicial Code takes effect on the first day of January next.

## *The Corporation Tax Decision*

THE Federal tax authorized by Congress to be levied and collected upon corporations doing business in the United States under state or United States incorporation acts, after having been in dispute since its enactment as a part of the Payne-Aldrich tariff in 1909, has been declared constitutional and valid by the Supreme Court of the United States.

The corporation tax provision, unlike the income tax provision of 1894, was drawn up with great care to anticipate constitutional objections and to conform to previous court decisions. In particular, it had in mind the clause of the war revenue act of 1898, which imposed on companies refining oil or sugar a special excise tax equal to one quarter of one per cent on the gross amount of all receipts in excess of $250,000. That statute was reviewed and upheld by the Supreme Court.

The constitutionality of the tax was contested on the ground that it was a direct tax, not apportioned and uniform throughout the country as the Constitution requires, but laid upon corporations wherever they might be found, the amount to be collected to be one per cent on the entire net income over and above

$5,000 received from all sources. It was answered that the privilege of doing business as a corporation is taxed, and not the mere doing of business. The argument that, by taxing a state-chartered corporation, the national government unconstitutionally invades the prerogative of the state which granted the charter, is dismissed by the court on the ground that, in the nature of things, Federal excise taxes "must be collected from the same activities as are also reached by the states in order to support their local governments; and that if this were not true, citizens could invalidate the taxing power of the nation simply by continuing their business under a state franchise."

This decision makes no change in the existing financial situation. The corporations have been paying the tax since the new law went into effect, under protest, reserving the right of a refund in case the law failed to pass the Supreme Court test. Up to date over $27,650,000 have been collected from the corporation under this statute, which sum the United States would have had to return to the corporations had the decision been adverse to the government. Such a refund would inevitably have necessitated a bond issue to meet the requirements of the Panama construction. According to the present reckoning no such recourse will be needed.

For good or for evil, the corporation tax is now a fixed fact in the fiscal system of the United States, subject, of course, to repeal at any time by act of Congress, or, on the other hand, to an increased rate of taxation should the condition of the Treasury appear to require additional revenue.

The court's action may be taken as another evidence that the government has power to regulate and control corporations, which are the creatures of its own laws.

On the other hand, if corporations can be taxed, it would seem to follow that they must have legal and constitutional rights to carry on business in such way as is necessary, provided nobody's civil and property rights be contravened. Such great combinations, by the very nature of their character and of what is required of them, create conditions and establish for themselves orbits in which they must move without hindrance or prevention, but under proper regulations.

## *The Standard Oil Case*

The effect of the decision of the Supreme Court of the United States, in the Standard Oil Case, that it is necessary to distinguish between "reasonable" and "unreasonable" restraint of trade, is to insert the word "unreasonable" into the general prohibition against combinations in the Sherman anti-trust law. The business interests, which have been anxiously awaiting the court's opinion in this case, will doubtless interpret it to mean that business combinations will not hereafter be subject to prosecution, simply on the ground that they are combinations, but that they must be guilty of "undue" restraint of trade before a case can be made out against them. It is probable that the great corporations will now feel that they have a right to make such combinations as they deem advisable, provided they are in accord with reason and common sense. This, however, establishes a vague and indefinite standard of judgment, and it is certain that there will be a good deal of agitation in Congress for the amendment of the Sherman anti-trust law. Such action will doubtless be sought, both by those who may be discontented with the recent decision, and by those who regard the statute as unduly drastic and believe that it ought to be modified.

England and Germany, our great commercial rivals, are developing with almost feverish eagerness the consolidation of their business forces, thereby aiming to eliminate wasteful competition and methods of production. It will not be to our ultimate interest to unduly hamper the economic life of the nation. The duty of adapting the anti-trust law to the business necessities of the country will rest upon Congress, which must attempt to reconcile the doctrine prohibiting restraints of trade with the natural laws of economic development.

# Among the New Decisions

**Bankruptcy—false representation of partner—effect.** A false representation by one member of a partnership for the purpose of securing credit, of which the copartner is ignorant, is held insufficient in Frank v. Michigan Paper Co. 103 C. C. A. 268, 179 Fed. 776, to prevent the latter from securing a discharge upon his individual petition therefor, under the statute requiring the granting of the discharge unless applicant obtained property on credit from any person upon a materially false statement made for that purpose, although it may prevent the discharge from operating as a release from liability for the credit so falsely obtained, under the section of the statute providing that the discharge shall release the bankrupt from all debts except such as are liabilities for obtaining property by false representations.

The right of a bankrupt to discharge as affected by acts of his partner or agent is discussed in a note appended to the report of this case in 30 L.R.A.(N.S.) 623, which is supplemental to a note in 20 L.R.A.(N.S.) 785.

**Carrier—shipper—right to sleep in car.** An immigrant required to accompany his stock and household goods for the purpose of caring for them is held in Chicago, R. I. & P. R. Co. v. Thurlow, 102 C. C. A. 128, 178 Fed. 894, 30 L.R.A. (N.S.) 571, not to be entitled to the rights of a passenger, where, after his car reaches destination, and his stock has been unloaded, he attempts to use the car for sleeping purposes, until his goods can be removed from it, and is killed because the car escaped at night and ran out on the main line, where it collided with a train, when the goods could be fully protected in the car, and hotel accommodations were obtainable near by.

While no other case has been found involving the rights of a drover or stockman in a car after his stock has been unloaded, the decision in this case seems to be in accord with the general principles as to the termination of a passenger's relation as such upon reaching his destination, and which have been discussed in notes in 2 L.R.A.(N.S.) 873, and 20 L.R.A.(N.S.) 1019.

**Check—direction as to payment—effect.** Where a check was drawn on a bank located in another town than that in which the drawer resided, and, immediately following the direction to the drawee bank, which was in the lower left-hand corner of the check, there were stamped, at the time when the check was drawn, the words, "payable through [a named bank in another city of the same state], at current rate," it is held in 134 Ga. 486, 68 S. E. 85, annotated in 30 L.R.A.(N.S.) 697, that this was a material part of the direction; and the drawee bank was not required to pay the check when not presented through the bank thus named, but directly by a third bank.

This decision seems to be one of first impression in this country upon this point.

**Constitutional law — filling low land** There seems to be no doubt that in particular cases, when necessary for the abatement of a nuisance, or to protect the public health, the authorities may fill or require low lots to be filled at the expense of the owner. Thus, it is held in Bowes v. Aberdeen, 58 Wash. 535, 109 Pac. 369, annotated in 30 L.R.A.(N.S.) 709, that the police power extends to filling, against the protest of their owners, and assessing the expense upon the property benefited, lots located in or near the business portion of a city, which are covered by flood tide, and because of inability to drain them are a menace to the public health and a hindrance to the growth of the city, where the tract is of considerable extent, and the proposed improve-

ment will allow proper drainage and the construction of needed streets.

**Constitutional law—delegation of power—making violation of street car rules an offense.** The Alabama case of Whaley v. State, 52 So. 941, annotated in 30 L.R.A.(N.S.) 499, seems to be the first which has considered the question of the constitutionality of statutes making a violation of transfer rules established by a carrier criminal. It holds that a statute making it a crime fraudulently or wilfully to violate the rules made by street car companies with respect to the issuance and use of their transfers is not unconstitutional as a delegation to such companies of the right to create or suspend the law.

**Corporation—repurchase of unpaid stock—effect.** An insolvent corporation is held in the Arkansas case of Tiger v. Cotton Cleaner & Gin Co. 130 S. W. 585, 30 L.R.A.(N.S.) 694, to have no power as against the rights of its creditors to purchase its own stock at a sale thereof for nonpayment of a balance due on the subscription, and thereby relieve the subscriber from further liability, since unpaid subscriptions are a trust fund for the benefit of creditors, of the benefit of which it cannot deprive them.

The subject of the right of a corporation to purchase its own shares of stock is treated in notes in 61 L.R.A. 621, and 25 L.R.A.(N.S.) 50.

**Criminal law—misdemeanor—disturbing meeting.** It is laid down in the recent Tennessee case of State v. Watkins, 130 S. W. 839, that it is a misdemeanor at common law wantonly to disturb an assembly of persons met together for any lawful purpose, such as the enjoyment of a Christmas tree, and that this law is not changed by a statute providing for the punishment of anyone who shall disturb a meeting for religious, educational, or literary purposes, or for the promotion of temperance.

The decisions dealing with the kinds of meetings within the purview of the common-law or statutory offense of disturbing meetings are collated in the note accompanying the report of this case in 30 L.R.A.(N.S.) 829.

**Divorce—lien—claim against stranger.** That a decree in chancery granting a divorce may establish a lien in favor of the wife upon a fund due the husband by a third person for an injury negligently inflicted is laid down in the Iowa case of Kithcart v. Kithcart, 124 N. W. 305, which is accompanied in 30 L.R.A. (N.S.) 1062, by a note which discloses that the ruling in this case does not seem to be in entire harmony with the few decisions which have considered the question. The holding of these cases seems to establish the rule that, in the absence of express statutory authority, the court has no power to establish a lien upon the husband's personalty to secure the payment of alimony.

**Divorce—alimony—compelling payment.** That the court cannot compel a husband who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by exercise thereof, derive an income, to comply with the court's order to pay alimony to his wife, in a suit for her separate maintenance, is held in Messervy v. Messervy, 85 S. C. 189, 67 S. E. 130, annotated in 30 L.R.A.(N.S.) 1001.

The general subject of contempt proceedings to compel payment of alimony is discussed at length in a note in 24 L.R.A. 433, where the earlier cases upon inability to pay as a defense are considered.

**Fixtures — storm shutters — mortgage.** Storm doors and windows made to fit a house and fastened in place by screws are held in Roderick v. Sanborn, 106 Me. 159, 76 Atl. 263, annotated in 30 L.R.A. (N.S.) 1189, to be fixtures which will pass with a mortgage and subsequent deed to the mortgagee, although during certain periods of the year they are removed from their places and stored on the premises.

**Highway—vacation—damages.** Where part of a street between the two next adjacent cross streets is vacated, it is held in the New Jersey case of Newark v. Hatt, 77 Atl. 47, that all of the land between the cross streets bounding on the partly vacated street suffers a special injury, whether it abuts on the vacated portion or not, for which damages may

be appraised and awarded, under a statute requiring a city to pay damages caused by the vacation of any street.

There is a conflict among the decisions of the different jurisdictions as to whether a property owner, whose means of access from one direction is shut off or interfered with by the closing of an adjoining street or portion of the street upon which he is situated, may recover damages. But the conflict seems to be in the application to specific facts of the generally adopted rule that, to entitle an owner to damages, he must show a violation of some right of his apart from that which he has as one of the public,—a loss or damage different in kind, and not merely in degree, from that suffered by the rest of the community.

The recent cases upon the subject are collated in the note appended to the Hatt Case in 30 L.R.A.(N.S.) 637, the earlier decisions having been discussed in a note in 2 L.R.A.(N.S.) 269.

**Indemnity insurance—sickness of employee—glanders.** Injury to an employee from glanders contracted from horses which his duties required him to handle is held in H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 92 N. E. 329, to be within a policy insuring the employer against liability for the loss imposed by law upon the insured for damages on account of bodily injuries accidentally suffered by an employee while on duty within the premises of the assured in the operation of his trade or business.

The decisions disclosing what injuries are covered by an employers' indemnity policy are collated in the note appended to this case in 30 L. R. A. (N.S.) 1192.

**Interstate commerce—attempted use of erroneous ticket.** The question of the right of a railroad passenger to ride upon a ticket issued in violation of the interstate commerce act or of the orders of the Interstate Commerce Commission is discussed for the first time in the South Dakota case of Melody v. Great Northern R. Co. 127 N. W. 543, 30 L.R.A. (N.S.) 568, holding that a passenger who accepts from a carrier's agent a ticket for interstate passage at a through rate which, under the rules of the Commission, does not allow stopover privileges, cannot hold the carrier liable in damages for his expulsion from the train in case he attempts to exercise such privileges, although the marks necessary to show the limited character of the ticket are not placed upon it.

**Intoxicating liquor — liability for sale.** That one cannot escape punishment for illegal sale of intoxicating liquor because it was made to one employed by the police department to procure it, such department furnishing the money to pay for it, is held in State v. Smith, 152 N. C. 798, 67 S. E. 508, which is accompanied in 30 L.R.A.(N.S.) 946, by a note setting forth the numerous cases which have arisen since the earlier note in 25 L.R.A. 341, on the question of instigation or consent to crime, for the purpose of detecting a criminal, as a defense to prosecution.

**Lease—existing conditions—right to continue.** The mere lease by the proprietor of a hotel for restaurant purposes of a room between the street and the rotunda of the hotel, with entrances upon both, is held in Jemo v. Tourist Hotel Co. 55 Wash. 595, 104 Pac. 820, not to include the right to have the entrance into the rotunda kept open, although closing it will cause a loss of patronage to the restaurant.

The case is accompanied in 30 L.R.A. (N.S.) 926, by a note on the right of a tenant to have entrance kept open, and which is supplemental to a note in 4 L. R.A.(N.S.) 565.

**Lottery—gift enterprise—trading stamps.** A scheme by which a corporation organizes a co-operative society to which it admits members upon payment of a nominal fee which entitles them to stamps from merchants under contract with the corporation, which it redeems in cash or merchandise, is held in District of Columbia v. Kraft, 35 App. D. C. 253, to be a gift enterprise within the meaning of a statute providing that every person who shall sell any article with the promise to give, or hold out the promise of gift of, anything in consideration of the purchase

of an article, shall be regarded as conducting a gift enterprise.

The subject of forbidding use of trading stamps is discussed in the note accompanying this case in 30 L.R.A.(N.S.) 957, and which is supplemental to annotation in 2 L.R.A.(N.S.) 588, and 7 L.R.A.(N.S.) 1131.

**Master and servant—extra work—compensation.** That compensation for work, within the scope of a regular employment, in addition to the usual but not fixed hours for a day's work, cannot be recovered in the absence of a contract therefor, unless the contract was entered into in reference to a controlling custom, is held in the North Dakota case of McGregor v. Harm, 125 N. W. 885. The circumstances under which a servant is entitled to recover remuneration for extra work are discussed in the exhaustive note which accompanies the report of this case in 30 L.R.A.(N.S.) 649.

**Monopoly—right to enforce collateral contracts.** Agents of a foreign corporation which was organized for legitimate business purposes, and has fully complied with the laws entitling it to do business in the state, are held in the Michigan case of International Harvester Co. v. Smith, 127 N. W. 695, not entitled to defeat an action by it to compel them to pay over money belonging to it, arising from goods sold and collections made, on the theory that it is a trust or monopoly either at common law or under a statute making illegal contracts in restraint of trade or commerce, although the statute denies to a foreign corporation violating its provisions, the right to do business in the state.

The subject of agreements collateral to contracts forming illegal combinations, and the enforcement thereof by members of such illegal combinations, is discussed in a note accompanying this case in 30 L.R.A.(N.S.) 580, and which is supplementary to notes in 11 L.R.A.(N.S.) 368, and 64 L.R.A. 712.

As shown in these notes, both at common law and under the Federal anti-trust act, and also many state anti-trust acts, which in general only reassert the common-law rule against monopolies, or are similar thereto, the mere fact that a contract is made by or with a member of an illegal combination, or by or with the illegal combination itself, does not invalidate the contract if it is collateral to the illegal combination or agreement, and is based upon a sufficient consideration.

**Negligence—cranking automobile frightening horse—liability.** There is but little specific authority as to the liability for frightening horses by the noise peculiar to the starting of an automobile. The question, like most others relating to liability for frightening horses, is generally one of fact for the jury upon the evidence. It was presented in the case of Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015, annotated in 30 L.R.A.(N.S.) 804, holding that one attempting to crank an automobile in close proximity to horses, without paying any attention to whether or not they are frightened by the resulting noise, and continuing to turn the crank until the machine starts notwithstanding the horses manifest fright, as the result of which they run away, is responsible for the resulting injury to them.

The case further decides that it is negligence *per se* to attempt to crank a defective automobile which makes a terrible noise when starting, in close proximity to horses, without giving their driver notice to remove them to a safe place.

**Officer — fees — accounting — naturalization.** It is generally held that a clerk under a fixed salary is not entitled to retain as his own the fees received in naturalization cases by virtue of his office. In conformity with this rule it is laid down in Barron County v. Beckwith, 142 Wis. 519, 124 N. W. 1030, annotated in 30 L.R.A.(N.S.) 810, that the fees or compensation to be turned over to the county treasurer by a county clerk who is by statute upon a salary in lieu of all fees or compensation for services rendered by him, which shall be so turned over, include fees collected under the naturalization laws of the United States, which authorize and permit him to retain a portion of the fees received, although the Federal law is passed subsequently to the state law, so that they were not directly in contemplation when the state law was passed.

**Statute—certainty—regulation of physicians.** A statute providing for the revocation of the license of a physician who advertises special ability to treat or cure chronic and incurable cases is held in the Arkansas case of State Medical Board v. McCrary, 130 S. W. 544, to be void for uncertainty.

This decision is accompanied in 30 L.R.A.(N.S.) 783, by a note discussing the grounds for revoking a physician's license, and which is supplemental to notes in 8 L.R.A.(N.S.) 585, and 17 L.R.A.(N.S.) 439.

**Telephone—transferring instruments—burden.** The question as to the right of a telephone company to require a patron to pay for installing or transferring instruments, seems to have been squarely presented for the first time in the New Mexico case of Colorado Teleph. Co. v. Fields, 110 Pac. 571, 30 L.R.A.(N.S.) 1088, holding that a telephone company whose maximum rentals are fixed by contract with the municipality in which it is to transact its business cannot enforce a regulation requiring patrons to pay a charge in addition thereto, for installing and transferring instruments.

The cases collated in the note which accompanies the report of this decision in 30 L.R.A.(N.S.) 794, disclose, the rule to be that where there is no evidence upon which to predicate a reference by the prosecuting attorney in his argument to the jury, as to attempts to bribe witness or jurors, the statement constitutes ground for reversal, provided the prejudice created is not removed by instructions from the court to disregard the statements made.

**Telephone—refusal of service—collection of debt.** That a telephone company cannot refuse to serve one who offered to pay its rates and comply with its reasonable rules and regulations, for the purpose of coercing payment of a debt contracted for service rendered in the past, is held in the Arkansas case of Danaher v. Southwestern Teleg. & Teleph. Co. 127 S. W. 963, which is accompanied in 30 L.R.A.(N.S.) 1027, by a note in which the cases dealing with the right of a telephone company to refuse service to coerce the payment of a bill are discussed.

**Water—periodic appropriation—locality.** The question whether a user of water above a mill may take and appropriate the water belonging to the mill, when it is idle, as against a junior appropriator who, while the mill was running, has continuously used it after it was returned to the stream seems to have arisen only in Colorado.

It has been held there in Windsor Reservoir & Canal Co. v. Hoffman Milling Co. 109 Pac. 422, that where a mill for which water has been appropriated is idle part of the time, the water not then needed for its purposes is subject to appropriation by a user above the point of the mill's intake.

Two earlier decisions on the subject are discussed in the note which accompanies this case in 30 L.R.A.(N.S.) 615.

**Witness—receivership—privilege of officer.** The question of the right of an officer of a corporation to refuse to turn over its books to a receiver, upon the ground that they have a tendency to incriminate him, appears to have arisen for the first time in Manning v. Mercantile Securities Co. 242 Ill. 584, 90 N. E. 238, holding that an officer of a corporation cannot refuse to comply with an order of an equity court to turn over its books to a receiver, because they may have a tendency to incriminate him, since in such cases the books go into the custody of the court and the constitutional protection of witnesses does not apply, because the court can protect the officer from the use of the books against him.

A number of analogous decisions are discussed in the note which accompanies the report of this case in 30 L.R.A. (N.S.) 725.

# Quaint and Curious

"I say the tale as 't was said to me."—Scott.

**The Blue and the Gray.** Four of the present justices of the Supreme Court of the United States saw military service in their younger days. Two of them fought under the stars and stripes and two under the stars and bars. Their presence upon the bench of the highest tribunal of the land speaks eloquently of a reunited nation.

Chief Justice White was a soldier in the cause of the Confederacy, as was Justice Lurton. The latter participated in Morgan's raid, one of the most daring exploits of the war.

Justice Harlan was colonel of the Tenth Kentucky Infantry, which served in the division of General George H. Thomas. It is said that this regiment at one time pursued a raiding party of the Third Kentucky Cavalry, C. S. A. The latter were overtaken while crossing a river. Colonel Harlan trained a cannon on the retreating enemy and tried to blow out of the middle of the river a trooper of the rear guard who was looking after a wagon. Fortunately the markmanship was bad, since this trooper happened to be none other than Justice Lurton.

Like Harlan, writes Mr. William E. Brigham in the Boston Evening Transcript, Justice Holmes was a Union soldier. He entered the Twentieth Massachusetts Volunteers in 1861 and served throughout the war, retiring as a brevet colonel. He was shot through the breast at Ball's Bluff, through the neck at Antietam, and in the heel at Marye's Heights, Fredericksburg. Oddly enough, the wound in the heel was the most severe of all, as the bullet passed between the tendons and seriously incapacitated the future justice for a long time.

Justice Holmes is the hero of his father's well-known story, "My Hunt After the Captain." It was Dr. Holmes's search for his son, after the receipt of the ominous despatch, "Captain Holmes wounded, shot through the neck, thought not mortal, at Keedysville," received after the battle of Antietam, that he describes in the story which, in its blending of pathos and humor, is as moving as anything ever done by the Autocrat of the Breakfast Table.

When the agonized father, after suffering untold disappointments, finally feels that he is on the right track, and almost within touch of his son, he writes with his whimsical touch: "Te Deum Laudamus! The Lord's name be praised! The dead pain in the semilunar ganglion [which, I must remind my reader, is a kind of stupid, unreasoning brain beneath the pit of the stomach common to man and beast, which aches in the supreme moments of life, as when the dam loses her young ones, or the wild horse is lassoed] stopped short. There was a feeling as if I had slipped off a tight boot or cut a strangling garter,—only it was all over my system."

And when at last they meet, the half-crazed father and the wounded son, their only greeting is:

"How are you, boy?"

"How are you, dad?"

"Such," comments Dr. Holmes, "are the proprieties of life, as they are observed among us Anglo-Saxons of the nineteenth century; decently disguising those natural impulses that made Joseph, the prime minister of Egypt, weep aloud so that the Egyptians and the house of Pharoah heard, nay, which had once overcome his shaggy old uncle, Esau, so entirely that he fell on his brother's neck and cried like a baby in the presence of all the women."

**Teasing the Lawyers.** Justices White, Holmes, and Harlan are more or less given to asking questions from the bench, although, of course, all the others chip in a word from time to time.

Chief Justice White, who is one of the most amiable men in the world off the

bench, is a terror to the lawyers that appear before the Supreme Court to argue cases, says the Washington Times. He can argue a case himself in French, Spanish, or English, and perhaps in some other languages. He is a student of philology, and when a lawyer is thrashing about as to the meaning of some word, the chief justice is apt to break out with something like this:

"Give the Greek derivative of it."

A common expression from the chief justice is: "Illustrate it; illustrate it."

To have the chief justice lean over the bench and explode a question under a green lawyer is apt to make the latter lose his feet completely. Some days ago, when the attorney general was arguing in the Standard Oil case, the chief justice shot out:

"Give an illustration of it."

But it didn't scare Lawyer Wickersham. He has been in court before and is hardened. He proceeded to illustrate what he was trying to tell, and seemed to satisfy the court with it.

A lawyer's favorite reply to an undesirable question from the bench is, "I am coming to that in a moment, if your Honor please." Often that reply riles the blood of the justices. A Mr. Wilby was addressing the court when Justice Jackson asked a question which led to the reply from the counsel before the bar: "I am coming to that in a moment."

"You are right there now, Mr. Will-Be," declared the justice, with an emphasis that left no doubt about the pun.

Few lawyers have enough courage to address the court as did Sidney Bartlett. While arguing a case, Mr. Bartlett had occasion to state what he considered to be the general rule of law applicable.

"That is not the law," interrupted Justice Gray.

"It was the law until your Honor spoke," suggested Mr. Bartlett.

When Justice Shiras was on the bench, says the New York Evening Post, a case came before the court involving the patent on a collar button. The counsel in addressing the bench was explaining the button's merits in glowing terms.

"Will the counsel please tell us," interrupted Justice Shiras, with his face long and sober looking, "if this button possesses that invaluable merit of proof against being rolled under a dresser or bed?"

It so happened that that very morning Justice Harlan had been telling his brethren about how he crawled around on the floor, before he came to court, on the trail of a delusive collar button. The court laughed at Justice Shiras's query. The attorney was nonplussed at the demeanor of the justices; he was not a member of the Harlan household, nor had he been in the robing room that morning; he tried to proceed, but he could not get started again, and almost immediately afterward sat down.

There was a case argued the other day where a very able lawyer, who had been at pains for some time to impress upon the Court a number of arguments which he himself evidently felt might be thought to be somewhat technical, and after a very eloquent percoration reflecting upon his argument before the Court, he made a final appeal to their sense of justice and of responsibility. He said: "I fear that the members of the Court may be somewhat weary with my insistence upon the rights of my client according to the law of the land; but in closing I want to recall an incident narrated in Scripture, of a man who had his servant come and say, 'Thomas, Thomas, thou art mortal.'" And the silence was broken by the deep voice of Mr. Justice Harlan, who said, "Where did you say that was narrated in Scripture?"

Once when the late Senator Dolliver was counsel in a case of which he knew relatively little, Justices Harlan and White insisted on plugging him with embarrassing questions for no other purpose than to make him get up and tell funny stories. But it is very seldom that this dignified court gets gay in this or any other manner.

**Baseball and the Bench.** While Chief Justice White and Justice McKenna never miss a ball game if they can help it, Justice Day is the real base-ball enthusiast on the Supreme bench. They say that he knows as much about the rules of the game as of the Supreme Court itself, and his broken-hearted appearance on the bench is never more

impressive than when a good ball game is on and he can't get away to attend it. This zealous devotion to the national sport is praiseworthy. It enables him to return with added zest to the subtle arguments of lawyers engaged in dissecting the Constitution.

**Court Etiquette and Custom.** The etiquette of lawyers in the presence of the Supreme Court, says the New York Sun, is very rigid. It extends even to their clothes. Counsel are expected to wear frock coats with black neckties, and if one should dare to appear in a sack suit in that open red carpeted space facing the nine justices he would be tapped on the arm by a court officer, and ruthlessly told to go home and dress himself properly. Some time ago a Western lawyer appeared before the court without a cravat. He was promptly notified that the court declined to hear what he had to say until he was properly garbed.

It was a joke among the lawyers in Washington when a few years ago a great legal light happened to be in the court room when suddenly a motion was called to which he was obliged to answer. He had on a pongee suit, and there was a grin on the faces of his fellow lawyers at his predicament. He came forward, however, stated the circumstances to the court, humbly apologized for his clothes, and was graciously allowed to proceed.

A Kansas member of the bar, states the New York Evening Post, drew forth an investigation on the part of the officers of the court, when he appeared to argue a case. He took his seat at the counselors' table without the semblance of a collar or necktie around his neck. Such dress might be proper for appearance before a justice of the peace in Kansas, but the court officers were determined to prevent any such precedent being established before the justices of the Supreme Court.

Fortunately, his partner was with him, who explained, upon being questioned, that his partner suffered from an affliction of the throat which forbade his wearing a collar. The officers were not inclined to make a scene on behalf of the absent necktie alone, so the matter was dropped.

On another occasion an Iowa attorney arose to address the court without removing his overcoat. The marshal thought it was a mere lapse of memory, and so sent a page down to impress upon the advocate where he was and how he looked. The counsel sent back word that he would comply gladly with the request of the court, if it insisted, but he added that he had injured his shoulder recently, was unable to wear a tight-fitting coat, and hence would be compelled to address the court in his shirt sleeves. The marshal decided to let well enough alone.

Within the last few years an attorney named Smith was in the court room. He dozed off during the argument of his opponent. The marshal sent a page to awaken him.

"The marshal says you cannot sleep in the court room," explained the page in justification of his seemingly rude demeanor.

"Thank the marshal for me, please," responded Mr. Smith, " and tell him he is mistaken; I have just had a splendid nap here."

Custom, governing the counsel of the court, once got a black eye, and from a woman, too. In 1879, Belva Lockwood made application for admission to the bar. The justices were shocked and horrified. They consented to take the matter under consideration. Finally a decision was reached, but it was not comforting to Mrs. Lockwood. The Court announced that it was against the custom to admit women to practise, and whatever might be the view of the members of the bench at that time the custom must be upheld.

Mrs. Lockwood replied that it was once customary, too, not to ride in railroad cars, but argument had no effect on the Court. It did have on Congress, and so a law was enacted enabling women to practise before the Supreme Court. Custom took a back seat, and Mrs. Lockwood was the first woman admitted to practise before the Supreme Court. Now there are thirty-five women on the attorneys' roll. The last one came from Wisconsin. She objected to the

custom which fails to provide a mirror in the court room by which the women members may remove their hats after entering the bar.

Not only must lawyers be particular about their clothes, observes the New York Sun, but they must be careful in their language before these nine solemn justices, the rustle of whose silken gowns is the only sound that breaks the impressive silence of the court room except the decorous procedure of business. There is a story of a certain great lawyer whose argument was considered as somewhat in the nature of an instruction to the Court. The chief justice interrupted him coolly to remark:

"Sir, it is perfectly safe to assume that the Supreme Court of the United States knows something."

In short, the Supreme Court must be handled with care, and at the slightest jolt something will always be heard to drop. There is a tradition that about seventy-five years ago a liberty was taken with a justice of the Supreme Court while on the bench. It was done by Henry Clay, and he escaped with his life. In those days justices took snuff on the bench, and Justice Bushrod Washington one day held his snuff box open with his hand extended on the arm of his chair. Henry Clay was arguing a case, and in the midst of a slight pause he leaned forward and deliberately took a pinch of snuff from Mr. Justice Washington's snuff box. Before the justices could recover from the shock of this awful transgression, Mr. Clay proceeded to lay the whole court out stone cold by saying blandly:

"I perceive your honor still sticks to the Scotch!"

The Constitution of the United States had provided no adequate punishment for this terrible offense, and the justices were forced to condone it, but as Justice Washington afterward solemnly said:

"I believe Henry Clay to be the only man in the United States who would have dared to take such a liberty."

Sometimes the justices are shocked and bear with it, and sometimes they don't. One day a Kansas lawyer almost stupefied the Court by addressing these dignified personages as "you fellows." That was once the Court remained silent.

**Preparation of Opinions.** Every Saturday morning while the Supreme Court is sitting, says the New York Evening Post, the justices meet in the conference room and discuss and vote upon the cases that have been submitted to them. The youngest member on the bench in point of service votes first on each case. When the decisions have been made and the justices leave the room, none of them knows who will be assigned to write the Court's opinion. The chief justice makes the assignment after the conference has broken up, and conveys the information privately to the members of the Court whom he has chosen. All of the other justices, however, are given full opportunity to read and carefully study the written opinion before it is handed down from the bench.

While in the conference room the justices must do without attendants. Every precaution is taken to prevent any word uttered in that chamber from leaking out. Even the oldest employees of the Court and those most intimately attached to the members of the Court are never permitted to be present while the justices are conferring. So far as human ingenuity can devise, nothing is left undone to insure that no inkling of the attitude of the Court or of the members of the Court becomes known in advance of its formal announcement.

The new justices soon discover that they come in for a harder and a larger share of the work of preparing opinions than the older members of the Court. The worst is not over, as far as the preparation of an opinion is concerned, when the first conference day is passed; neither is the end necessarily near at hand when the first draft is completed. A proof sheet must be sent to each of the other members of the Court for their comment and correction. How merciless one justice is toward his brother's copy no one but the justices themselves may know. Rhetoric, diction, grammar, and punctuation are as sharply criticized as the views of the law expressed in the opinion.

It is related that Justice Clifford, who presided over the Electoral Commission in 1877, was more sensitive about corrections of his rhetoric than of his law. The Maine jurist had a habit of omitting

the definite article. He was always writing "Court said" or "judgment was," leaving out the little "the" with a regularity that weighed heavily on Justice Grier. One day Justice Grier spoke about the peculiarity.

"Brother Grier," said Justice Clifford, "you may criticize my law, but my style is my own."

**Will of Lewis Morris.** We are indebted to Mr. Virgil M. Harris, of the St. Louis bar, who has just issued an interesting and valuable work on "Ancient, Curious, and Famous Wills," for the following extract from the will of Lewis Morris, of Morrisania, who was the father of the celebrated orator and statesman, Gouverneur Morris, of New York, who died in 1816. His will recites: "My desire is, that nothing be mentioned about me, not so much as a single line in a News Paper, to tell the World I am dead; it is my Desire that my son Gouverneur Morris may have the best Education that is to be had in England or America, but my Express Will and Directions are, that he never be sent for that purpose to the Colony of Connecticut, Least he should imbibe in his Youth that Low Craft and Cunning, so Incident to the People of that Country, which is so interwoven in their constitutions, that all their art cannot Disguise it from the World, Tho' many of them under the Sanctified Garb of Religion have endeavour'd to Impose themselves on the World for Honest Men."

It does not appear in what way the colonists of Connecticut had incurred the wrath of the testator. In any event, the will was written so long ago that any acrimony which accompanied it has doubtless long since been lost by limitation. It is a curious instance of the manner in which men sometimes seek to perpetuate their animosities beyond the tomb, and to transform the probate records into a book of doom.

**Wanted Mrs. Taft's Name Too.** A lawyer in North Dakota, says the New York Sun, has made the discovery that land patents are not valid because they are signed simply by the President. He has just written to the commissioner of the General Land Office returning a government patent, with the reminder to the Department that, "by an oversight manifestly," Mrs. Taft did not join in signing the document.

The President seemed to enjoy the letter more than any other person in the official circle. As a matter of fact the President never signs a land patent in person. There is a woman clerk in the land office who, at the personal designation of the President, is empowered to sign the President's name to land warrants. The North Dakota lawyer is the first person to conceive the idea that it was requisite in a land patent that the wife of the President join in the instrument.

**Nickel Novels Delighted Big Men.** It was the custom of the late Chief Justice Fuller, of the United States Supreme Court, to read himself to sleep nearly every night. He took a book, went to bed early, and read until he slept, whether that was 9 o'clock in the evening or 3 in the morning.

Nor was he particular about the books. Novels, history, criticism, philosophy, essays,—all were one with him; but, as much as anything, he liked detective stories. The late Senator A. H. Platt, of Connecticut, was a great reader of detective stories, too, as are other men whose minds are working actively many hours a day on great problems.

The Senator and Chief Justice met at a dinner one night. "I understand," said the chief justice gravely to Senator Platt, "that you read detective stories."

"I do," replied Senator Platt, with equal gravity.

"Tell me," continued the Chief Justice, "which do you prefer, the 5-cent kind or the 10-cent kind?"

"Well," said the Senator, after mature deliberation, "I think I prefer the 5-cent kind."

"So do I," assented the Chief Justice; "you get quicker action in those."

And this point having been settled, they took up a certain phase of the Constitution.—Saturday Evening Post.

# New Books and Recent Articles

**"Ancient, Curious, and Famous Wills."** By Virgil M. Harris, of the Louisville Bar, Lecturer on Wills in the St. Louis University Institute of Law, Trust Officer of the Mercantile Trust Company of St. Louis. (Little, Brown & Co., Boston) $4.00 Net. 8 vo. 450 pp.

The author presents in the first chapter of this interesting and valuable book some practical suggestions for will writing, and devotes succeeding chapters to ancient wills, wills in fiction and poetry, curious wills, testamentary miscellany, wills of famous foreigners and of famous Americans. Extracts have been made from about five hundred wills, obtained from various parts of the world. Such a work has never before been attempted in America. The fact that the author is a lecturer on wills, and a practical will writer, has enabled him to select the subject-matter with a discerning eye, and to arrange it in an attractive manner.

It has been well said that to read a will "over is to come very close to the spirit of the man who wrote,—to know his treasures, to understand his feeling toward men, and to measure his fitness for adventures among seraphic and angelic beings." A will is, indeed, instinct with the personality of the testator. The hand that signed it still reaches out to bestow gifts, to point the finger of scorn, or to control the destinies of the living. Testamentary literature, more than any other outside of the sacred writings, probes the depths of human nature and discloses the essential kinship of the race. Joy and sorrow, love and hate, gratitude and remorse, hope and fear, run through the pages of these testaments of frail humanity. Their perusal will not only interest the historian or the lover of the quaint and curious, but will disclose to the careful student the deepest springs of human action. Professor Harris's book will brighten an idle hour or afford deep thought for a serious one, according to the reader's mood.

**"Crime, Its Causes and Remedies."** By Cesare Lombroso, late professor of Psychiatry and Legal Medicine in the University of Turin. With an introduction by Maurice Parmelee, Ph. D., Associate Professor of Sociology in the University of Missouri. Translated by Henry P. Horton M. A. (Little, Brown & Co., Boston) $4.50 net.

The name of Lombroso is already universally known to Americans. The work here presented is his latest general survey of the broad field of criminology, and treats of all aspects of his philosophy of crime. It is mainly devoted to a discussion of the social causes of crime, which he portrays with his characteristic breadth of treatment. He attempts to systematize and elaborate the various reforms now in operation for the prevention of crime. His great message seems to be the individualization of penal treatment,—the application to each individual of appropriate curative processes.

Lombroso's first conception of the born criminal as an atavistic phenomenon destined to prey upon society was subsequently modified by seeing in him also a sick man whose normal development has been arrested. It is also evident that many of the criminal characteristics which he calls atavistic are not hereditary in their origin, but are cases of arrested development either before or after birth. Nor is it the opinion of the biologists that acquired characteristics can be transmitted by hereditary means, as Lombroso seems to suggest. While he recognized the power of environmental forces to prevent the expression of inborn tendencies, he attached undue weight to the influence of hereditary forces upon the habits of a person. The theory most closely associated with his name, that there is an anthropological type which corresponds to habitual criminal conduct has also been widely discussed and severely attacked. But in spite of his errors, Lombroso remains the great pioneer and versatile genius who led the way in the development of the new science of criminology. Only as the legal profession familiarizes itself with the principles of this science can it render intelligent and efficient service in the needed reformation of our criminal law.

**"Legal Doctrine and Social Progress."** By Frank Parsons, Ph. D. (B. W. Huebsch, New York) $1.50. 219 pp.

This little volume is a mine of thought. In trenchant paragraphs, the author presents his conception of the law as an evolutionary force and as a power for social progress. He believes that the broadening spirit of democracy can attain its ideals more surely by the gradual achievement of needed reforms than by the violence of a revolutionary upheaval. He views the law as a live, changing, and adjustable instrument, subservient to the needs of the age, and cherishing in its traditions the wisdom of the past and the hopes of the future. If anyone despairs of the Republic, and only sees wrongs and social barbarism intrenched behind the courts and inelastic constitutions, a perusal of Professor Parson's book will likely bring him to a hope of better things. He will learn that the law is helping to create the conscience, which, in turn, will make the new law expressing itself,

and that the spirit of service or the love of doing good work for its own sake, which already rules the lives of many, may become the dominant social motive of to-morrow and be reflected in its law.

This work is a posthumous publication. For several years before his death, Professor Parsons had accumulated material for the book, and its writing occupied the closing months of his life. His wide knowledge of the law, his work as a legal writer, and his experience as an educator, peculiarly qualified him for the task.

**"Actions for Land."** By Honorable Arthur Gray Powell, Associate Judge of the Court of Appeals of Georgia (The Harrison Company, Atlanta, Ga.) $7.50. 753 pp.

The absence of a book dealing with the preparation and trial of cases involving disputed land titles, and suited to the local jurisprudence of Georgia, led Judge Powell to undertake the present work. While most of the citations are to the Georgia Reports and Code, it is believed that the book will be of general utility in other states, since the law of Georgia in that respect is almost wholly a development of the common law and an adaptation of it to local conditions. As to substantive matters, such as possession, landlord and tenant, etc., the book will be valuable in any state, so far as general discussion is concerned.

The propositions are stated in a simple and elementary way in the main text, and are exemplified and elaborated in the footnotes. This arrangement renders the book serviceable both to the student wishing a general or cursory view of the law, and to the practitioner searching for a more minute or philosophic treatment of the subject.

The learned author is entitled to the thanks of the profession for the accurate and interesting manner in which he has presented one of the abstruse and forbidding topics of the law.

**"Notes on the Minnesota Reports."** Vol. I, including 1-25 Minn. Rep. (The Lawyers Co-operative Publishing Company, Rochester, New York.) $7.50.

The annotation contained in this volume traces out every citation of each Minnesota case by any court of last resort, and shows how the case has been applied, enlarged, or limited by them, thus giving a complete history of each decision. References to the case in the editorial annotations of the leading annotated reports are also given. A third and novel feature consists in showing where, and to what point, every Minnesota case has been cited in any important text-book.

By these means the value of each decision can be speedily tested and weighed. Those of intrinsic importance and worth are disclosed, "broadening from precedent to precedent," while those of doubtful accuracy are seen to be limited or disapproved by subsequent decisions, or to be criticized or rejected by annotators and text-book writers engaged in building the structure of a scientific jurisprudence. A philosophical study of case law is possible only upon such a basis as these notes afford.

**"The Constitution of the United States of America."** (Riverside Press Edition.) $5.

**"Corporations: Public Carriers, Public Works and Other Public Utilities."** By Bruce Wyman. 2 vols. Buckram, $12.50.

**"New Jersey Corporations."** By John S. Parker. 2 vols. Buckram, $10.

**Chamberlayne's "Modern Law of Evidence."** 4 vols. $28.

**"Municipal Franchises."** By Delos F. Wilcox. Vol. 2. $5.

**"History of the Sherman Law."** By Albert H. Walker. $2.

**"Supplement to Haviland & Greene's Table of New York Cases Analyzed, 1908-1911."** By James H. Greene. 1 vol. Canvas, $7.50.

**"Foreign and Colonial Patent Laws."** By W. C. Fairweather. $3.

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**"An Annotated Continuation of the Vermont Digest."** By Guy B. Horton. Including vols. 78 to 83 Vermont. Sheep or buckram, $3.

**"McQuillin's Municipal Corporations."** In about 5 volumes. Volume I. ready in 60 days. Succeeding volumes at intervals of 30 days. (Callaghan & Co., Chicago.) $6.50 per volume.

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"The Doctrine of Due Process of Law before the Civil War."—24 Harvard Law Review, 460.

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"The Art of Cross-Examination. II."—1 Criminal Law Reporter, 23.

"Cross-examination of Prisoners."—75 Justice of the Peace, 169.

# How the Supreme Court Convenes

NO more imposing entrance of a judicial body was ever devised than that of the chief justice and the eight associate justices of the Supreme Court into the Supreme Court chamber, a beautiful semi-circular hall with a noble arched ceiling, in the center of the Capitol building, says the New York Sun under Washington, date November 27. Until the wings of the Capitol were completed this hall was the Senate chamber, and echoed in the olden time with the eloquence of Daniel Webster, Henry Clay, John Randolph, and John Tyler. It is now sacred to the use of the most august secular tribunal in the world. Across it runs a long platform with nine great arm chairs, that of the chief justice slightly differing from the rest, being in the middle. Before the bench is a wide, red carpeted space for the lawyers, and beyond this are arranged around the semicircle red-cushioned benches for spectators. Behind the bench on which the justices sit is a huge screen, or reredos, with a door in the middle.

Everything in the hall is soberly sumptuous. The atmosphere is one of solemnity, as well it may be, for in this place of dignity history of many kinds has been made.

At 11 o'clock, when the court convenes, the lawyers are in waiting; to be a moment late would be the unpardonable sin. There are always spectators awaiting the court, sometimes anxious clients with tremendous interests involved. When the court is ready to appear, an official advances and gives three thundering raps, which sound like the crack of doom, and proclaims:

"The Supreme Court approaches."

At that all present rise, a door is opened by another functionary, and the long line of justices in their robes, headed by the chief justice, is seen majestically crossing the corridor from their robing room. When they reach the wide doors, respectfully held open for them, the crier announces:

"The Supreme Court of the United States." Until recently the announcement was:

"The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States."

But following the death of Chief Justice Fuller and during the time when Associate Justice Harlan presided, the court was hailed merely as "the Supreme Court of the United States." That the new form was good enough for him was the decision of Chief Justice White when it was proposed to resume the old-time practice.

The justices, headed by the chief justice, upon entering, go behind the long screen, so that four of them may be on one side of the chief justice and four on the other. Their entrance and place on the bench are strictly regulated by seniority of service. The chief justice enters from the door in the screen, held open for him. All mount the bench, and, standing for a moment, bow ceremoniously to the right and the left, to the lawyers and the spectators, all present bowing in return. The chief justice seats himself, the other justices then take their seats, the spectators sit, and the court crier proclaims:

"The Supreme Court of the United States is now in session."

# Judges and Lawyers

A Tribute to Judicial and Professional Work

## Judge Grosscup and His Work

PETER Stenger Grosscup was born February 15, 1852, at Ashland, Ohio. His lineage on his father's side runs back to Holland; on his mother's to Germany; but all the ancestors have been in this country from before the Revolution. His great-grandfather, Paul Grosscup, was for many years a member of the Pennsylvania Colonial Assembly, and afterwards of the Pennsylvania State Assembly, as also, of the convention that in 1791, at Philadelphia, framed the first Constitution for the state of Pennsylvania. The connection on the father's side also include the Stengers, well known in Pennsylvania politics and at the bar. He was educated in the schools at Ashland, and in Wittenberg College, one of the educational institutions of the Lutheran Church, graduating in 1872, at the head of his class. He obtained his degree of Bachelor of Laws from the Boston Law School.

He practised law in Ashland, Ohio, from 1874 to 1883, being city solicitor for six years of that time. In 1876 he was a candidate of the Republican party for Congress, but was defeated. Coming to Chicago in 1883, he entered the law firm headed by Leonard Swett, a former law partner of Abraham Lincoln, and the best known lawyer at that time of the West. From this time he participated in some of the most important trials occurring in the West, and built up his reputation as a lawyer.

December 12, 1892, he was appointed to the United States District Bench by President Harrison. Soon after going on the bench, he attracted the attention of the country in his decisions upon the application of the government to close up the World's Columbian Exposition on Sundays. He dissented from the two circuit judges on that occasion. On an appeal to the circuit court of appeals, presided over by Chief Justice Fuller, this dissent was sustained.

One of his widely-known services was in connection with the Debs' riots in 1894. In connection with Circuit Judge William A. Woods, he issued the injunction in favor of the government, and against the rioters on that occasion. When the injunction thus issued was disregarded by the rioters, Judge Grosscup sent a telegram to the President, calling for the Federal troops,—a call that unquestionably saved the city from mob violence. Adding to this the common-law machinery, he summoned a grand jury for the earliest day possible by law, and delivered to them, on their assembling in the midst of the riots, a charge that gave him an instant national reputation. This charge is preserved in the Federal Reporter, and is looked upon as a model of classic, forceful, and apt English, as well as a courageous judicial act. The indictment and arrests that followed were the beginning of the end of mob violence.

Other cases decided by Judge Grosscup that have attracted wide attention are the Whisky Trust case; the Railroad case, in which he upheld the right of silence under the 5th Amendment to the Constitution; the Interstate Commerce cases; and more recently, the Telegraph cases; the Beef Trust cases; the Railway Injunction case; and the Chicago Traction cases. In all these, and his other opinions, Judge Grosscup has shown his power to go directly to the core of a controversy, to eliminate the unessential

things, and to build up argument in language so attractive that it holds attention, and so clear that it reaches the commonest intelligence.

In January, 1899, on the death of Judge Showalter, Judge Grosscup was promoted to the Circuit Court of Appeals by President McKinley, and since 1905 has been the presiding judge.

Besides his judicial duties, Judge Grosscup has delivered many general addresses that have attracted the attention of the country, one at Indianapolis in June, 1898, which had a circulation of more than one hundred thousand copies, and a Declaration Day address at Galesburg in 1894 that was widely commented on in connection with the strike of 1894. At the Saratoga Conference of the Civic Federation that took place in 1898, Judge Grosscup spoke for territorial expansion, leading in the debate with Carl Schurz on the other side—a speech that was published throughout the country. At Lincoln, Nebraska, before the University of Nebraska, Judge Grosscup first gave utterance to his thought on the problem presented by the presence of the corporation in American life. Judge Grosscup has never been what is called a "trust buster"; has never been the enemy of the corporation or incorporated property; has never advocated destructive methods, nor even regulation to the extent that "regulation" would interfere with the freedom of individual initiative and energy. Judge Grosscup has no leaning toward socialism, nor paternalism, but is an earnest individualist. Incorporated property now employs nearly one third of the wealth of the American people, and furnishes a livelihood to nearly one half of our people. This great domain of incorporated property Judge Grosscup would not destroy nor hamper. What he advocates is that, as a medium of holding property and wielding industrial energy, the corporation should be made so trustworthy that it may furnish safe direct investment for those whose wealth, now borrowed out of the financial institutions, carries it; and that it may interest as proprietors the men who are attached to it as workers; in other words, that the incoporated domain may be put in the course of occupancy and ownership by the people of America, as the farms of America are owned by the farmers of America, and the powers of government itself are wielded by the people of America. In aid of this great human reform, as distinguished from a mere economic reform, Judge Grosscup in speeches all over the country, has advocated the reconstruction of the corporation by state and nation, on lines that will make it a trustworthy medium of popular proprietorship.

The Traction cases in Chicago gave Judge Grosscup an opportunity to put some of his ideas into practice. The properties were capitalized at more than $80,000,000, and the securities had been distributed among more than 20,000 investors. The administration of the properties in Judge Grosscup's court resulted in new franchises, and a new issue of securities, each man receiving in the new exactly the proportion that he had held in the old, at the same time that the city got a substantial interest in the ownership in return for the use of its streets; and on all hands now it is admitted that, though Judge Gosscup was subjected to much criticism through the five years that the work was going on, the work has turned out to be the best piece of constructive statesmanship that Chicago has yet seen.

In appellate work, the aim of Judge Grosscup has been to clearly formulate and declare the law, instead of piling up volumes of reports. In none of the nine circuits have the opinions of the judges been more direct and compact. The ideal has been to state the law, rather than argue it. A large amount of important litigation has, in that way, been disposed of in comparatively few pages. One of the best known of the cases in which Judge Grosscup wrote the opinion was what is known as the Standard Oil $29,000,000 fine. The opinion is regarded, universally, as an excellent example of analysis of evidence, and the application, to the facts thus obtained, of fundamental maxims of law. Two other cases in which Judge Grosscup wrote the opinions, even more interesting from the standpoint of a constantly expanding jurisprudence, are the cases of Gooding v. Reid, Murdock & Co. 101 C. C. A. 310,

177 Fed. 684, and National Teleg. News Co. v. Western U. Teleg. Co. 56 C. C. A. 198, 119 Fed. 294, 60 L.R.A. 805, in which a new application of the powers of a court of equity was made. "The law is a garment that should be fitted to the life of a people, not the life of a people trimmed to the garment," is a principle uttered by Judge Grosscup in a recent speech in New York, and sums up pretty well his general conception of the law. His love of justice and fair play amounts almost to a passion, and nothing ever deters him from giving to his settled judgment and conviction the full swing of all the power at his command. His career on the bench has been fearless, useful, and exemplary.

The home life of Judge Grosscup, lasting until the death in 1899 of his wife, who before her marriage was Virginia Taylor of Loudenville, Ohio, and the marriage of his daughter in 1905, was to his friends one of the most attractive of his characteristics. He was deeply devoted to his wife, and still is to her memory.

### JUDGE SANBORN AND HIS NOTED DECISIONS

WALTER H. Sanborn was born at Epsom, New Hampshire, on October 19th, 1845, at the original homestead of the family on which his great-grandfather Eliphalet Sanborn settled in 1752, and from which he went into the French and Indian War under Wolfe, and into the War of the American Revolution.

Mr. Sanborn was graduated the leader and valedictorian of his class in 1867 at Dartmouth College, from which he has since received the degrees of A. M. and LL.D. He commenced the practice of law with his uncle General John B. Sanborn, at St. Paul, Minnesota, in May, 1871, and continued to practise with him until 1892, when he was commissioned United States circuit judge of the eighth judicial circuit, which position he still occupies.

Judge Sanborn conducted the receiverships of the Union Pacific Railway Company and its allied roads, from 1894 until the completion of the foreclosures and the distribution of the assets of those roads, and through the receivers collected in money and bonds, and applied to the operation of the railroads, and distributed to creditors more than $260,000,000, without the loss of a dollar or the reversal of a decree or order.

In 1893 Judge Sanborn wrote and filed the opinion of the United States circuit court of appeals of the eighth judicial circuit in United States v. Trans-Missouri Freight Association, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58, 24 L. R. A. 73, in 1903 he participated in the hearing and decision of the Northern Securities Company case; in 1909 he wrote the opinion of the United States circuit court for the eighth circuit in the Standard Oil Company's case. But recently Judge Sanborn has written the opinion of the circuit court of appeals in the Oklahoma Rate cases and the Oklahoma Pipe Line cases, and has written and filed his opinion as United States circuit judge in the Minnesota Rate cases.

In speaking of the latter decision, the St. Louis Star aptly remarks:

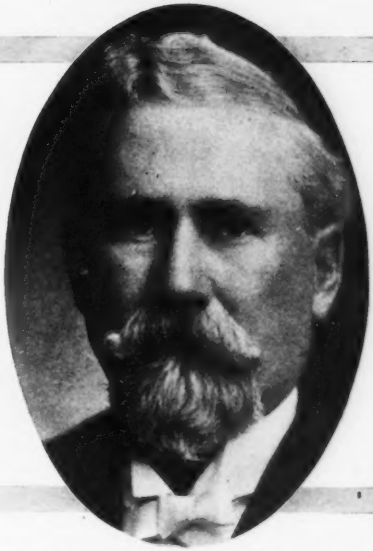
"If the spirit of Judge Sanborn's decision in the Minnesota Rate case is upheld by the Supreme Court, it will put an end to all attempts by states to regulate fares and rates on railroads. It sounds the knell of state regulation, and ushers in the era of complete Federal control.

"The decision is not based on the contention that the rates are too low to give the roads a profit, and therefore confiscatory. That has been the sheet anchor of the roads in resisting the 2-cent laws of the various states. It was the contention which overthrew the Missouri statute, now under appeal. It will no longer be necessary to advance that plea if this decision holds.

"Judge Sanborn clearly and emphatically declares the doctrine of the superior right of the Federal government to control roads, even with reference to their interstate business. He holds that any state regulations for interstate commerce which 'substantially burden or regulate interstate commerce, or the fares or rates therein, are beyond the powers of the state, unconstitutional, and void.'

"It is only necessary, under the spirit

HON. PETER S. GROSSCUP OF ILLINOIS, PRESIDING JUDGE U. S. CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT



HON. WALTER H. SANBORN OF MINNESOTA, U. S. CIRCUIT JUDGE, EIGHTH CIRCUIT

of this decision, to show that the rates and fares established by a state in any substantial manner affect interstate commerce, to have them overthrown. This would be an easy matter.

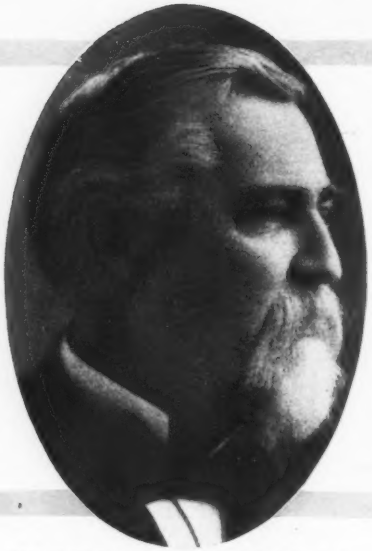
"We have been drifting rapidly towards Federal control of railroads, to the complete exclusion of the states. This decision shows how far we have progressed. It may not take us long to go the remainder of the distance. We are bound to reach it, because divided control is a logical absurdity and an economical impossibility. A railroad cannot possess a dual character, and dual control of it is impossible. It cannot serve two masters.

"Because of our instinctive clinging to our theory of state sovereignty, we have been slow to nationalize the railroads, but the irresistible force of conditions is compelling it."

### JUDGE PARDEE—SENIOR CIRCUIT JUDGE IN SERVICE

DON A. Pardee was born at Wadsworth, Medina County, Ohio, on March 29th, 1837. During the years 1854-1857, he was an acting midshipman at the United States Naval Academy. He read law in his father's office and was admitted to the bar in November, 1859. Thereafter he practised law at Medina, Ohio, until the breaking out of the Civil War, when he entered the volunteer service. He served in the Army from September 1861, to December 1864, as major and lieutenant colonel of the 42d Ohio Volunteer Infantry, and on March 13th, 1865, was breveted brigadier general of volunteers "for gallant and meritorious services during the War." In 1865, he settled in New Orleans and opened a law office. He was appointed register in bankruptcy in 1867. He was elected judge of the second judicial district of the state of Louisiana in 1868; was re-elected in 1872 and again in 1876, serving three full terms of four years each. He was elected and served as a senatorial delegate to the constitutional convention of Louisiana in 1879. In 1880 he was the Republican candidate for Attorney General of the state.

Of all the judges of the circuit courts of the United States Judge Pardee is the senior in commission and service, having been appointed in May, 1881, by President Garfield. His decisions first ap-



HON. DON A. PARDEE OF GEORGIA, U. S. CIRCUIT JUDGE, FIFTH CIRCUIT

HON. WILLIAM L. PUTNAM OF MAINE, U. S. CIRCUIT JUDGE, FIRST CIRCUIT

peared in volume 9 of the Federal Reporter, and extend over the whole series subsequent thereto. The number and importance of the cases which Judge Pardee has decided, and the judicial learning and ability which they demonstrate, have given him undisputed rank among the eminent judges of the Federal courts.

### JUDGE PUTNAM—A FAVORITE SON OF MAINE

JUDGE Putnam is a native and lifelong resident of Maine, having been born at Bath in that state on May 26th, 1835. He received the degree of A. B. from Bowdoin College in 1855, and has since been honored with the degree LL.D. both by his *alma mater* and by Brown University. He was admitted to the bar in 1858, and for the next thirty-four years practised his profession in Portland. In 1869 he was elected mayor of that city. Twice during his career at the bar he declined an appointment as judge of the supreme judicial court of Maine. In September, 1887, he was appointed by President Cleveland a commissioner to negotiate with Great Britain in settlement of the rights of American fishermen in Canadian waters. He also acted as a commissioner under the treaty of February 8th, 1896, between the United States and Great Britain. In 1888, Judge Putnam was the Democratic candidate for governor, receiving an unprecedently large vote. He has held the position of United States circuit judge, first circuit, since 1892. He has written numerous admirable opinions covering nearly every branch of the law.

### JUDGE MORROW AND HIS IMPORTANT CASES

AFTER finishing his preliminary studies, Judge Morrow entered upon the study of the law, and was admitted to the bar in 1869. From 1870 to 1874 he acted as assistant United States attorney for California. From 1880 to 1885, he appeared as special counsel for the United States before the French and American Claims Commission, and during part of that period he was attorney for the California State Board of Harbor Commissioners. In the latter year he was elected a representative in Congress, serving in the forty-ninth, fiftieth and fifty-first Congresses. In 1891, he was appointed United States district judge for the northern district of California,

and since May 20th, 1897, has been judge of the United States circuit court and the United States circuit court of appeals, ninth judicial circuit.

During the past few months Judge Morrow has been called upon to decide a number of important cases. In the case of the Seattle Electric Co. v. Seattle, Renton, & Southern R. Co., he announced the doctrine that suits involving controversies between municipalities and local public-service corporations, concerning rate-fixing ordinances or franchises, must be brought in the state courts, where there is no diversity of citizenship and the Constitution of the state in express terms or in substance guarantees to its citizens that "no person shall be deprived of life, liberty, or property without due process of law." Judge Morrow proceeded on the theory that where the states "guarantee to their citizens equal protection of the laws," and there is no diversity of citizenship between the parties, there is no Federal question in issue, and the Federal courts have no jurisdiction. This decision would restore to the states the right of determining through their own courts the construction and effect of their own statutes, of which they have been deprived by the action of their citizens in invoking the 14th Amendment and resorting to the Federal tribunals.

In the cases of Woodside v. Railroad Commissioners of Nevada, and Southern Pac. Co. v. Railroad Commissioners of Nevada, decided in the circuit court, Judge Morrow announced a doctrine of unusual interest and value to the public, by holding that expensive management on the part of a railroad company will not justify higher rates to pay expenses and dividends to stockholders.

HON. WILLIAM W. MORROW OF CALIFORNIA, U. S. CIRCUIT JUDGE, NINTH CIRCUIT

### DEATH OF JUDGE ROGERS

BENEATH unruffled coverlets and surrounded by every indication of a passing away as peacefully as a child dropping off to sleep, the dead body of Judge John H. Rogers was found in his room on the morning of April 17th, 1911.

Judge John Henry Rogers was born near Roxabel, in Bertie county, North Carolina, on October 8, 1845. When he was a small boy his parents moved to Mississippi. He passed his early days on his father's plantation in that state, obtaining his education at such schools as that section of the country afforded at that time. In 1862, before he was seventeen years old, he joined the Confederate Army, with which he served until the War closed. Most of his service was with Company F, Ninth Mississippi Infantry, known locally as the Semmes Rifles. He took part in the battles of Murfreesboro, Chickamauga, Peach Tree Creek, Franklin, and in fact nearly all of the desperate battles in which the Army of Tennessee was engaged during the last two years of the War. He was wounded twice in these encounters.

He entered the Army as a private, but on account of his splendid record at the battle of Franklin, he was made first lieutenant of his company, and was in this position when the company, with the remainder of the regiment, surrendered to the Federal Army under General Sherman, at Greensboro, North Carolina.

Judge Rogers held in utmost reverence the sword he wore at the time darkness came upon the cause for which he fought. At the Confederate reunion in New Orleans a few years ago, he made a defense of the principles of the Confederacy that attracted attention all over the United States.

HON. JOHN H. ROGERS, DISTRICT JUDGE, WESTERN DISTRICT OF ARKANSAS

After the close of the War, Judge Rogers entered the University of Mississippi, at Oxford, graduating from that institution in 1868. He began the study of law that year, and moved to Fort Smith in 1869. He completed the study of law at Danville, Kentucky, in 1873, after which he returned to Fort Smith. He formed a partnership with Judge William Walker, one of the most eminent members of the Arkansas bar at that time.

Judge Rogers attracted attention from the very incipiency of his career as an attorney, by reason of his earnestness, his ability, and the success that attended his efforts. His partnership with Judge William Walker continued until he was chosen the first judge of the twelfth judicial circuit which position he held two terms, until 1882, when he was elected to Congress.

He was faithful in the laborious work of the committee room, and was active in the floor of the House as a participant in the debates when the great current events of the day were under consideration. He served four consecutive terms, and then voluntarily retired.

Perhaps the most noted opinion in the career of Judge Rogers as a member of the bench was one involving the interstate commerce law. The express companies at Fort Smith refused to ship liquor into Oklahoma, which was prohibition territory, and the matter was taken into court, finally coming before Judge Rogers, who handed down an opinion to the effect that, as such refusal would be an interference with interstate commerce, the companies had no right to decline the shipments when proffered.

Judge Rogers was one of the most able men on the bench, and commanded the respect and admiration of the entire bar. In private life he was above reproach,—a devoted husband, an indulgent and affectionate father, and an exemplary citizen.

### DEATH OF EX-JUDGE HOFFMAN

Within twenty-four hours after he had lost his first homicide case, ex-Judge William T. Hoffman, one of the best-known lawyers in the state of New Jersey, dropped dead at his home, "Lasada," at Englishtown, Monmouth county, on April 19th, from a stroke of apoplexy.

Ex-Judge Hoffman appeared at some of the most noted criminal trials in the state. He was seventy-four years of age, and had lived in New Jersey all his life. He was born at Jamesburg, New Jersey, on November 8, 1836. He studied law under ex-Governor Joseph D. Bedel, and was admitted to the bar in 1862. He was presiding judge of the Hudson county court from 1873 until 1878. He was for four years president of the Hoboken board of education. He was unsuccessful when he ran for Congress on the Republican ticket in 1892, but ten years later he was elected assemblyman from Monmouth county.

**JUDGE AMIDON—DAKOTA'S PROGRESSIVE JURIST.**

HON. CHARLES F. AMIDON OF NORTH DAKOTA, DISTRICT JUDGE FOR DISTRICT OF NORTH DAKOTA

JUDGE Amidon is a native of New York, having been born at Clymer, Chautauqua county, in that state on August 17th, 1856. He graduated from Hamilton College in 1882, and in the same year went to Fargo, North Dakota. He was admitted to the bar in 1886 and soon attained prominence in his profession. In 1893 he was a member of the committee appointed to revise the Code and statutes of North Dakota. He has been United States district judge for the district of North Dakota, since August 31st, 1896. During the past six or seven years he has been called upon frequently to sit upon the circuit court of appeals of the eighth circuit.

Judge Amidon has made some noted addresses. His paper entitled, "The Quest for Error, and the Doing of Justice," read before the State Bar Association of Minnesota, was one of the first discussions of the evil of granting new trials for technical errors, and attracted wide attention. President Roosevelt took up its recommendations in one of his messages to Congress, and the remedy proposed in the address has since been indorsed by the American Bar Association, and is now pending before Congress.

At the annual meeting of the American Bar Association in 1907, Judge Amidon in his address entitled, "The Nation and the Constitution," urged that the Constitution must be read in the light of the national life, insisting that that had been the method of its interpretation by Marshall and by such judges as Miller, Field, and Bradley. He contended that the national government must treat railroads as instruments of interstate commerce, the same as navigable waters, and that inasmuch as they were chiefly instruments of interstate commerce, and could not be subject to a divided authority, that the national government ought to take exclusive control of such subjects as the regulation of their rates. This latter view at the time was considered somewhat advanced. It has since been adopted by President Taft and Attorney General Wickersham, and is embodied in the important decision of Judge Sanborn in passing upon the Minnesota Rate Cases.

**SECRETARY OF INTERSTATE COMMERCE COMMISSION DIES**

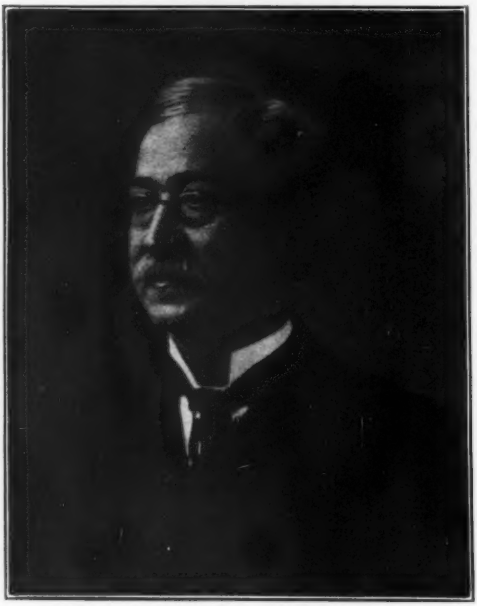
Edward A. Moseley, secretary of the Interstate Commerce Commission, and the originator of much labor legislation, died in Washington, District of Columbia, April 18th, after a long-continued illness, aged sixty-five years.

As an intimate friend and personal adviser of Presidents, Cabinet Officers, Representatives, Senators, and other public officials during the last quarter of a century, Mr. Moseley accomplished notable results, particularly along humanitarian and philanthropic lines.

He was recognized as an authority upon all measures designed to insure the safety of railway employees and travelers, and was instrumental in securing the enactment of laws requiring the use by the railways of safety devices. In recognition of these services, he received the thanks of the legislature of Massachusetts and of practically all the great railroad labor organizations.

## JUDGE ATKINSON OF THE COURT OF CLAIMS

HON. George W. Atkinson was born at Charleston, West Virginia, on June 29th, 1845. He graduated at Ohio Wesleyan University in 1870, which later conferred upon him the degrees of A. M. and LL. D. Other universities have honored him with the degrees of Ph. D., LL. D., and D. C. L. He was admitted to the bar in 1875. After holding various appointive Federal positions, he was elected a member of the Fifty-first Congress. From 1897 to 1901, he was governor of West Virginia, and, during the four succeeding years, served as United States district attorney for the southern district of that state.



HON. GEORGE W. ATKINSON

Judge Atkinson has published a number of interesting and valuable books. Among them may be mentioned his History of Kanawha, West Virginia Pulpit, After the Monshiners, Revenue Digest, Don't or Negative Chips from Blocks of Living Truth, Prominent Men of West Virginia, Psychology Simplified, and poems and public addresses.

He was appointed an associate judge of the court of claims on April 15th, 1905. We are indebted to his courtesy for the article on "The Court of Claims," published on a preceding page of this number, and which was delivered by him before the last meeting of the West Virginia Bar Association.

CAPTAIN IRA D. BRONSON

### DEATH OF RAILROAD BUILDER AND FORMER ATTORNEY

Captain Ira D. Bronson, for twenty years a resident of Seattle, and father of Ira Bronson, a well known attorney of Seattle, died recently at the Seattle General Hospital.

Mr. Bronson was born in the Mohawk valley, New York, October 24, 1835, but went to Seattle from Boston. He served throughout the Civil War, being among the first volunteers to enlist. He entered the cavalry service as a private, and was mustered out as a captain.

Later he took up the study of the law, and was admitted to the bar, but most of his subsequent career was spent in projecting and building railroads in the Middle West, among others the St. Louis, Fort Scott, & Wichita railroad, now a part of the Missouri Pacific system.

### PHILADELPHIA ATTORNEY DIES

Harry Shelmire Hopper, whose interesting article on "the Antiquated Seal" appeared in the December '10 Case and Comment, died in Philadelphia on April 6th.

# The Humorous Side

Life's a jest and all things show it.—Gay

**A Constitutional Question.** "I'm not quite sure whether yours is a constitutional disease or not," admitted the physician. "That being the case," sighed the invalid, "I'll have to get a decision from the United States Supreme Court."—Chicago Daily News.

**Judge Brewer Meant Well.** The late Justice Brewer was presiding, years ago, over a civil case in which one of the important witnesses was a horse doctor named Williams. The doctor was a small man with a weak little voice, and the counsel on both sides, as well as the court and jury, had great difficulty in hearing his testimony.

During cross-examination the counsel for the plaintiff became exasperated and began to prod and harry the little man.

"Dr. Williams," he shouted, "if we are ever going to get anywhere with this case you must speak up so the court will hear you. Speak up loud and strong, sir!"

The small-sized veterinary tried, but it was evidently no use. Whether from embarrassment or inability the sound would not come.

"Well, your Honor—" began the counsel indignantly, when Judge Brewer stopped him with a gesture. Leaning over the bench he said in his kindly tone:

"Mr. Attorney, you must be patient with the doctor. He cannot help it. Years spent in the sickroom have apparently made speaking low a second nature with him."—St. Paul Dispatch.

**Ambidextrous.** "I want you," said Mr. Dustin Stax, "to show that this law is unconstitutional. Do you think you can manage it?" "Easily," answered the attorney. "Well, go ahead and get familiar with the case." "I'm already at home in it. I know my ground perfectly. It's the same law you had me prove was constitutional two years ago."—Washington Star.

**A Supreme Court Fish Story.** The late Justice Brewer was with a party of New York friends on a fishing trip in the Adirondacks, and around the camp fire one evening the talk naturally ran on big fish. When it came his turn the jurist began, uncertain as to how he was going to come out:

"We were fishing one time on the Grand Banks for—er—for——"

"Whales," somebody suggested.

"No," said the justice, "We were baiting with whales."—Everybody's Magazine.

**The Missing Ducks.** In a country police court a man was brought up by a farmer accused of stealing some ducks.

"How do you know they are your ducks?" asked the defendant's counsel.

"Oh, I should know them anywhere," replied the farmer, and he went on to describe their different peculiarities.

"Why," said the prisoner's counsel, "these ducks can't be such a rare breed. I have some very like them in my own yard."

"That's not unlikely, sir," replied the farmer; "they are not the only ducks I have had stolen lately!"

"Call the next witness," said counsel. —Ideas.

**The Intent.** A little boy was once brought before a magistrate, charged with throwing stones at railway trains.

"What have you to say in answer to the serious charge?" asked his worship.

"I didn't throw no stones, sir. I was only going to," said the boy.

"Only going to!" echoed the magistrate. "Well, the intent was there, and as a deterrent I shall fine you $5."

On leaving the court the father of the boy was called back and informed that he hadn't paid the fine.

"That's so," replied the parent. "I should have done so; but, as the intent is just as good in law, why, you're paid!"—St. Paul Dispatch.

**Lawyers Spoiled the Case.** Several lawyers were discussing the United States secret service the other day in the marshal's office in the Federal building. Much that they said was directed at a quiet but capable deputy marshal, who took it in silence until he got an opportunity to counter. The most persistent of his tormentors began to tell of a counterfeiting case where the severity of the government put a "good fellow" in jail.

"Well, it was different in my country," exclaimed the deputy marshal, breaking into the confab.

"We had the evidence on the fellow all right," he continued. "He had made about a peck of silver dollars. The only difference between his product and Uncle Sam's was that the counterfeiter put a couple more grains of silver in his. He got away with it for months, and when we began to collect evidence we had bags full of the 'phony' dollars. When the man was placed on trial the learned members of the bar were permitted to satisfy their curiosity by handling the counterfeits. But the man was acquitted."

"How was that?" one of the lawyers wanted to know.

"You see, the lawyers walked off with the evidence. They didn't leave a single dollar," was the reply.—Philadelphia Times.

**New Way to Pay Old Debts.** A West Virginia darky, a blacksmith, recently announced a change in his business as follows: "Notice—De co-pardnership heretofore resisting between me and Mose Skinner is hereby resolved. Dem what owe de firm will settle wid me, and dem what de firm owes will settle wid Mose."

**The Retort Courteous.** A member of the New York bar, in the management of a case in one of the higher courts, quoted the proverb, "Cast not thy pearls before swine." As he rose to sum up, the judge said jokingly: "Be careful, Mr. S—, that you do not cast your pearls before swine." "Don't be alarmed, your Honor, I am about to address the jury, not the Court!" he replied.

**Difference of Opinion.** The professor of law was quizzing his class. Singling out a somnolent student in the rear of the room, he addressed a question to him. Confused, the student rose, and bent his ear to catch the stage whispers of his friends seated about him.

"Well, you ought to be able to answer," snapped the professor, "with all the aid you are receiving back there!"

"Professor," came the quick reply, "I could, but there's a difference of opinion back here."—Exchange.

**Charged the Jury.** By some twist of the election an old negro had been elected to the office of justice of the peace in a little backwoods district in Tennessee. His first case happened to be one in which the defendant asked for a trial by jury. When the testimony was all in, the lawyers waited for the judge to give his instructions to the jury. The new justice seemed embarrassed. Finally one of the lawyers whispered to him that it was time to charge the jury. He webstered one hand into the front of his coat, calhouned his voice, and said:

"Gent'm'n ob de jury, sence dis am a putty small case, Ah'll on'y charge yo' a dollah 'n' a half apiece."—N. A. R. D. Notes.

**Awful Inquisition.** A little colored girl, deeply insulted by her playmate, who had pushed her "off'n de stoop," took her case before the justice of the peace. He inquired into the circumstances and said, turning to the injured one:

"The plaintiff is allowed to ask the defendant a question, in regard to the assault."

"Wha's dat you' say, sah?"

"I say that you may ask the defendant a question."

"Wh-what'll Ah ask her, sah?"

"Any question you like."

The child studied the floor a moment. Then, with the politest of smiles, she inquired, "Sally, am you' mamma well?"—Everybody's Magazine.

# INTERNATIONAL HYMN

(Tune, America ; or, God Save the King.)

Sung for the first time at the **Thackeray Celebration** by the **Louisiana Historical Society,** at New Orleans, Tuesday, March 28, 1911.

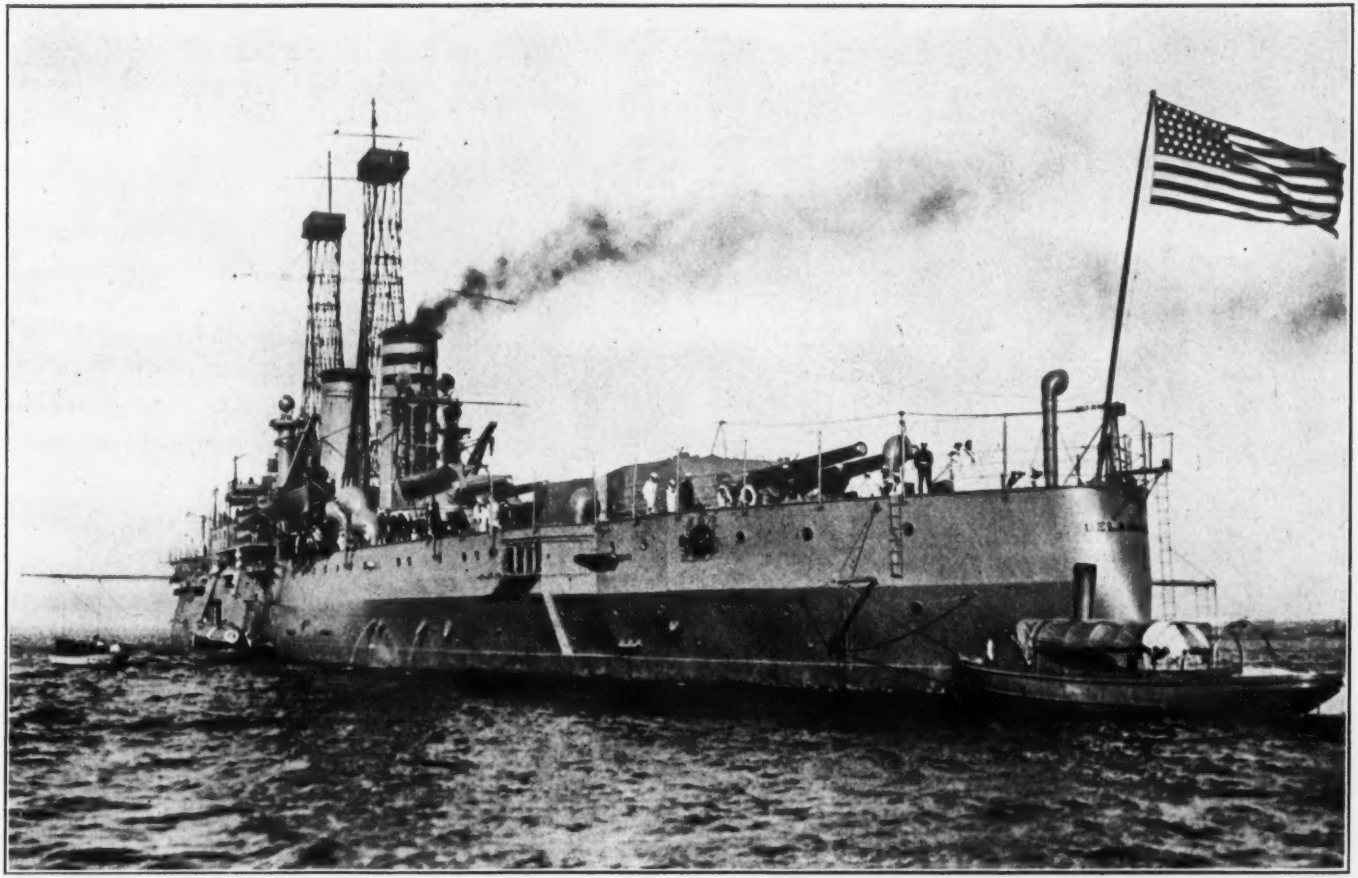
TWO empires by the sea,
Two nations great and free,
One anthem raise.
One race of ancient fame,
One tongue, one faith, we claim,
One God, whose glorious name
We love and praise.

What deeds our fathers wrought,
What battles we have fought,
Let fame record.
Now, vengeful passion, cease,
Come, victories of peace;
Nor hate nor pride's caprice
Unsheath the sword.

Though deep the sea and wide
'Twixt realm and realm, its tide
Binds strand to strand.
So be the gulf between
Grey coasts and islands green,
With bonds of peace serene
And friendship spanned.

Now, may the God above
Guard the dear lands we love,
Both East and West.
Let love more fervent glow,
As peaceful ages go,
And strength yet stronger grow,
Blessing and blest.

—*George Huntington.*





Battleship Delaware which Represented the United States Navy at the Coronation of King George V of England.